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No. 2392

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

D. T. BATEMAN, et al

Appellants,

vs.

SOUTHERN OREGON COMPANY, a corporation, et al

Appellees.

Upon Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

FILED

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Court of appeals
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Appellants,

vs.

SOUTHERN OREGON COMPANY, a corporation, et al
Appellees.

**Names and Addresses of Solicitors
upon this Appeal:**

For Appellants:

T. S. Minot,	Mills Bldg., San Francisco, Cal.
E. L. C. Farrin,	Portland, Oregon

For Appellees:

Dolph, Mallory, Simon & Gearin,	
	Mohawk Bldg., Portland, Oregon
A. M. Crawford,	Salem, Oregon
J. W. Crawford,	Salem, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 29 day of July, 1913,
there was duly filed in the District Court of the
United States for the District of Oregon, a Bill of
Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

*In the District Court of the United States of America,
in and for the District of Oregon.*

D. T. BATEMAN, R. R. KNICKERBOCKER,
SARAH FUNGE, GEORGE O. MATSON,
GUSSIE R. SMITH, WALTER H. COHICK,
P. J. WILLIAMS, W. H. IRWIN, M. F.
HOPKINS, WILLIAM L. BUNKER,
THOMAS J. LOWE, DAISY D. GRISS-
IM, O. P. ROSLAND, A. S. J. SMITH,
HARRY HUFFMAN, CHARLES W.
KNICKERBOCKER, LEAL DAVIS, E. B.
FONTAINE, H. W. JACKSON, CATHER-
INE E. DONAVAN, CLARA P. KNICKER-
BOCKER, W. J. O'BRIEN, J. O. WARNER,
A. O. PEGG, S. L. WILEY, HENRY S. LA-
THROP, F. G. BUSH, WILLIAM ROWE,
A. S. KELLY,, L. F. STRUCKMEIER, WIL-
LIAM F. DIXEY, A. ALTENBURG, NINA
BOUCHER, M. J. GLENNON, EUGENE
KNICKERBOCKER, SAMUEL F. GRIS-
SIM, BLANCHE G. BUCKNER, IRVINE
KNICKERBOCKER, FRED M. STERN,

COLIN HILL, ALBERT H. QUICK, LISTON CLARK, JAMES L. DUTTON, W. M. MORAN, P. D. PARTRIDGE, AGNES HUFFMAN, H. C. HITCHINGS, AGNES DeGRAY, E. P. HICKEN, W. G. CONKLIN, MARY S. BREWER, O. M. PRICKETT, H. E. WATSON, THOMAS A. PLACE, GEORGE M. BRISTOW, F. C. WILLSON, B. WATERS, H. G. SPARGAR, ROBERT B. HILL, G. W. HILL, K. C. HILL, L. D. HILL, WILLIAM P. HILL, EMMA HILL, H. J. GODFREY, ALONZA S. BREWER, W. P. HITCHINGS, W. A. ATWOOD, F. W. HITCHINGS, HENRY D. HALL, CORA M. PARKER, F. L. LEWIS, ANNA L. STACY, F. H. PARKER, J. B. BREWER, JAMES A. COHOE, F. A. De GRAY, POLLY A. HITCHINGS, E. A. WAKELEY, HARRIET R. LEE, WILLIAM R. HARDWICK, THOMAS LANE, H. W. KLOTZ, GEORGE BUTLER, J. H. DALE, MARGARET SIMMERS, W. E. SIMMERS, M. S. PRICE, D. C. BERRY, JAMES S. WIGGINS, THOMAS R. HANCOCK, M. J. GATES, W. R. WOODWARD, MARY ORR MINER, O. A. HOTCHKISS, R. C. SADLER, W. A. RICKEY, FRANK A. GIBSON, ALFRED WILLIAMS, HENRY BEAL, C. C. LYON, R. G. EDWARDS, REY MOAD, WALLACE MOAD, W. H. CONE, C. H. PARKER, T.

W. PACK, MARY I. WAKELEY, C. H.
COVEY, JENNIE A. EDWARDS, W. R.
JONES, J. B. BAIS, ELLA C. ROLLINS, A
voluntary unincorporated Association,
Plaintiffs,

vs.

THE SOUTHERN OREGON COMPANY, a priv-
ate corporation,
THE STATE OF OREGON, a political corporation,
OSWALD WEST, Governor of the State of Oregon.
A. M. CRAWFORD, Attorney General of the State
of Oregon,

Defendants.

Your orators, the claimants herein, complain of de-
fendants, and say unto your honors:

I.

That said claimants are a voluntary unincorporated
association and bring this bill of complaint against the
defendants herein, and say:

II.

That the Southern Oregon Company now is, and, at
all times hereinafter mentioned, was a private cor-
poration, duly incorporated, organized and existing
under and by virtue of the laws of the State of Ore-
gon, and was and is a resident and a citizen of said
state, with its head office and principal place of busi-
ness at North Bend and Empire City, Coos County,
Oregon.

That the defendant, the State of Oregon, is a po-
litical corporation, and one of the states comprising

the United States of America.

That defendant, Oswald West, is the Governor of the State of Oregon, and by virtue of his official position, is one of the legal representatives of said State, in all matters connected with titles to property, or public matters, in which the State of Oregon has, or claims to have, any interest, or estate as trustee, or otherwise.

That defendant, A. M. Crawford, is the Attorney General of the State of Oregon, and its representative in all litigated matters connected with titles to property, or public matters, in which the State of Oregon has, or claims to have any estate or interest as trustee, or otherwise.

III.

That for the purpose of constructing and maintaining a military wagon road between Coos Bay and Roseburg, Oregon, the Congress of the United States of America, on or about the 3rd day of March, 1869, passed an Act entitled: "An Act Granting Lands to the State of Oregon to Aid in the Construction of a Military Wagon Road from the Navigable Waters of Coos Bay to Roseburg in said State." That said Act did grant all of said lands to the State of Oregon, in trust, for the purpose therein set forth, and said Act contained the following proviso or quasi contract and condition subsequent, which was accepted in all its parts by the State of Oregon as such trustee and the Coos Bay Wagon Road Company: "*Provided, further, that the grant of lands hereby made*

shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding Two (\$2.50) Dollars and 50/100 per acre." And a copy of said Act is hereunto annexed, marked exhibit "A", and made a part of this complaint.

IV.

That on or about the 22nd day of October, 1870, the Legislature of the State of Oregon, pursuant to said original Granting Act and in acceptance of the subject matter thereof, duly passed "An act donating certain lands to the Coos Bay Wagon Road Company," which said Act was duly approved on said date, and said Act did pass along all the interest of the State of Oregon, as trustee, in said grant aforesaid, (Subject to all the restrictions, limitations and conditions in said original Granting Act contained) in and to said granted lands, to the Coos Bay Wagon Road Company, and a copy of said Act is hereunto attached, marked exhibit "B", and made a part of this complaint.

V.

That the aforesaid Act of Congress, exhibit "A", contained no provisions authorizing the issuance of patents for the said lands so granted, for the reason that said Granting Act conveyed such title as Congress saw fit to grant, at that time, but subsequently, and on or about the 18th day of June, 1874, the Congress of the United States of America duly passed an Act authorizing descriptive patents to issue for said

lands granted as aforesaid and other lands in a similar condition, and said Act was duly approved and became a public law and contained the following limitation and proviso: *"Provided that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled."* That a copy of said Act, authorizing descriptive and limited patents for said lands to issue, is hereunto attached, marked exhibit "C" and made a part of this complaint.

VI.

That the said Coos Bay Wagon Road Company was, at all times mentioned herein, a private corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, but is now, and has been for a long time, duly dissolved by proclamation of the Governor of the State of Oregon, for non-compliance with the various statutes of said state affecting the life of private corporations.

That said Coos Bay Wagon Road Company, during its existence as a corporation, by virtue of the Act of the Oregon Legislature, exhibit "B" was the primary beneficiary, or first cestui que trust of the State of Oregon, as to all of said lands included within the terms of said grant, to use and dispose of the same according to the terms of said original Granting Act, and the Act of the Legislature of the State of Oregon, and not otherwise.

VII.

That after the approval of said Act of the Legisla-

ture of the State of Oregon, on October 22, 1870, the said Coos Bay Wagon Road Company, as primary beneficiary of said trust, as aforesaid, assumed to, and thereafter did, in the manner hereinafter set forth, and not otherwise, exercise and enjoy the several rights, privileges and benefits of the aforesaid Acts of Congress, and the aforesaid Act of the Legislature of the State of Oregon, and did expressly submit and assent to all of the terms and conditions in said Act of Congress contained, up to certain dates, hereinafter set forth, when it unlawfully, and fraudulently violated all the terms, restrictions, limitations, and conditions of the same.

VIII.

That during the years 1873, 1874 and 1876, said Coos Bay Wagon Road Company did apply for patents to the Department of the Interior of the United States, for all the lands claimed by said Coos Bay Wagon Road Company, under the aforesaid Acts of Congress, and the Legislature of the State of Oregon, and thereafter the United States of America did issue and deliver to the said Coos Bay Wagon Road Company, the qualified and restricted patents of the United States, for all the lands granted by the said Act of Congress approved March 3, 1869, and marked exhibit "A" in this case. That the serial number of said qualified and descriptive patents, the dates thereof, and the quantity of land embraced therein, respectively, are as follows, to-wit:

Patent No. 1, dated February 12, 1875,

embracing42,496.93 acres

Patent No. 2, dated March 18, 1876,	
embracing	1,080 acres
Patent No. 3, dated November 8, 1876,	
embracing	61,111.53 acres
Patent No. 4, dated February 17, 1877,	
embracing	431.65 acres

The lands patented as aforesaid aggregated105,120.11 acres and said patents did recognize, and refer to said Granting Acts of Congress, and the whole thereof.

IX.

That in violation of the aforesaid restrictions, conditions, and limitations against the disposition and sale of the aforesaid granted lands, in large tracts, the said Coos Bay Wagon Road Company, wrongfully and unlawfully attempted to transfer a portion of said land, in fee simple, to one John Miller, alias Ambrose Woodroof, on the 31st day of May, 1875, and on or about said date the said Coos Bay Wagon Road Company, did execute and deliver to said John Miller alias Ambrose Woodroof, a void deed of conveyance, purporting to convey to said John Miller alias Ambrose Woodroof, all the aforesaid granted lands embraced in said Patent No. 1, excepting such portions thereof as had been sold and conveyed to other parties, and the land embraced in said deed of conveyance aggregated 35,533 and 59/100 acres.

That in further violation of said Granting Act the said Coos Bay Wagon Road Company did unlawfully and fraudulently execute and deliver to said John

Miller, alias Ambrose Woodroof, a certain deed of conveyance, dated the 31st day of May, 1875, purporting to convey unto the said John Miller, alias Ambrose Woodroof, the aforesaid Government wagon road, in aid of the construction of which the said original Granting Act was enacted.

X.

That in both of the transactions mentioned, as to the said John Miller, Alias Ambrose Woodroof, he had no actual interest, or estate therein, but, on the contrary, was acting solely as the agent, and for the benefit of one Collis P. Huntington, one Charles Crocker, one Leland Stanford, and one Mark Hopkins, and said last named parties were the actual parties in interest, as purchasers under said deeds of conveyance, wrongfully, and unlawfully executed, and delivered by said Coos Bay Wagon Road Company, to said John Miller, alias Ambrose Woodroof, as aforesaid.

That pursuant to these unlawful acts, and to further carry out the secret agreement, and understanding, had and made between said John Miller, alias Ambrose Woodroof, Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins, two certain instruments in writing, to-wit: Two deeds of conveyance, by the terms of one of which said John Miller, alias Ambrose Woodroof, did, pursuant to the aforesaid secret agreement, attempt to convey to Collis P. Huntington, Charles Crocker, Leland Stanford, and Mark Hopkins, the aforesaid Government Wagon Road, and by the terms of the other deed of convey-

ance, said John Miller, alias Ambrose Woodroof, did, pursuant to the aforesaid secret agreement, attempt to convey to said Collis P. Huntington, Charles Crocker, Leland Stanford, and Mark Hopkins, all the aforesaid lands attempted to have been conveyed to said John Miller, alias Ambrose Woodroof, by said Coos Bay Wagon Road Company, in violation of the terms of the original Granting Acts.

That thereafter, and on or about the 27th day of March, 1882, a certain deed of conveyance was executed, and delivered, to said Charles Crocker, by said Collis P. Huntington, and Elizabeth Huntington, his wife, and Mary Frances Sherwood Hopkins, as the sole heir of said Mark Hopkins, then deceased, purporting to convey, and vest in said Charles Crocker, a full legal title to all the lands conveyed, as aforesaid, by the Coos Bay Wagon Road Company, to the said John Miller, alias Ambrose Woodroof, and by the said John Miller, alias Ambrose Woodroof, to the said Collis P. Huntington, Charles Crocker, Leland Stanford, and Mark Hopkins.

XI.

That on or about the 20th day of December, 1883, said Charles Crocker, and Mary A. Crocker, did execute, and deliver to one William H. Besse, a certain deed of conveyance purporting to convey unto the said William H. Besse, all of the said Wagon Road lands, held by said Charles Crocker, as grantee, as aforesaid, and on or about the 29th day of December, 1883, the said William H. Besse, and Harriet

C. Besse, his wife, executed and delivered to one Russell Gray, a certain deed of conveyance, purporting to convey unto the said Russell Gray, all of said lands conveyed, as aforesaid, unto said William H. Besse, by said Charles Crocker, and Mary A. Crocker, his wife.

That on or about the 5th day of January, 1884, the said Russell Gray, did execute, and deliver to the Oregon Southern Improvement Company, a corporation organized for the purpose of purchasing said land, a deed of conveyance, purporting to convey unto the said Oregon Southern Improvement Company, all of the lands conveyed by said William H. Besse and Harriet C. Besse, his wife, to said Russell Gray, as aforesaid.

XII.

That again, and on or about the 7th day of January, 1884, in violation of the terms, provisions, limitations, restrictions, and conditions of said Act of Congress, and of the Legislature of the State of Oregon, the said Coos Bay Wagon Road Company, did wrongfully, and unlawfully, execute and deliver to the aforesaid William H. Besse, a deed of conveyance, attempting to convey unto the said William H. Besse, all of the lands embraced in said Patents numbered respectively 2, 3 and 4, then remaining unsold, aggregating 61,143.37 acres.

That on or about the 4th day of June, 1884, the said William H. Besse, and Harriet C. Besse, his wife, did execute, and deliver, unto the said Oregon South-

ern Improvement Company, a certain deed of conveyance, purporting to convey to the said Oregon Southern Improvement Company, all of the said lands conveyed to said William H. Besse, by said Coos Bay Wagon Road Company as aforesaid.

That in each and all of the transactions herein mentioned as to them or either of them, the said William H. Besse, and Russell Gray, acted respectively as the agents, and on behalf of said Oregon Southern Improvement Company, and not otherwise.

XIII.

That on or about the first day of January, 1884, with full knowledge of, and in absolute violation, and disregard of the aforesaid terms, provisions, and conditions of said Act of Congress, approved March 3, 1869, marked exhibit "A" and "B" and the Act of the Legislature of the State of Oregon, in this complaint, the said Oregon Southern Improvement Company, did, without having any estate in any of said lands, execute, and deliver to the Boston Safe Deposit and Trust Company, (corporation then existing under the laws of the State of Massachusetts) a certain fraudulent and nugatory deed of trust, or mortgage, purporting to convey and mortgage unto said Boston Safe Deposit and Trust Company, all real and personal property then owned, or thereafter to be acquired by said Oregon Southern Improvement Company, including the lands unlawfully conveyed from the Coos Bay Wagon Road Company, by mesne conveyances, to said Oregon Southern Improvement

Company, as hereinbefore set forth, to secure the payment of certain bonds, to be thereafter issued by said Oregon Southern Improvement Company, and which said deed of trust or mortgage, as to the granted lands, was executed and delivered in disregard and violation of the aforesaid terms, provisions and conditions of said Act of Congress, and the Legislature of the State of Oregon, and said Oregon Southern Improvement Company did, attempt to, in terms, authorize and empower the said Boston Safe Deposit and Trust Company, and its successors in the aforesaid trust, in case of default in the payment of said bonds, purported to be secured as aforesaid, to sell, and cause to be sold, all the lands conveyed to said Oregon Southern Improvement Company, as hereinbefore set forth, in one parcel, or in any quantity, or quantities, and for the highest price obtainable, in disregard of the conditions, and restrictions contained in the aforesaid Act of Congress, and said Act of the Legislature of the State of Oregon.

That thereafter and on or before the 1st day of May, 1885, and with like purpose, intent, and legal effect, the said Oregon Southern Improvement Company, did execute, and deliver to said Boston Safe Deposit and Trust Company, a further instrument in writing, of like tenor, and effect, as said trust deed last mentioned and described, being supplemental thereto.

XIV.

Thereafter, and on or about the 9th day of Novem-

ber, 1886, the said Boston Safe Deposit and Trust Company, was succeeded by one William J. Rotch, and one Edward D. Mandell, as trustees, under said deeds of trust, or mortgages, respectively.

Thereafter, and on or about the 28th day of December, 1886, the said William D. Rotch and Edward D. Mandell, as trustees, as aforesaid, collusively instituted a certain suit in the Circuit Court of the United States, for the District of Oregon, against the Oregon Southern Improvement Company, to foreclose said mortgages or deeds of trust, said suit being identified in the records and files of said Court as No. 1344; and thereupon, and thereafter, such proceedings were had therein that on the 11th day of April, 1887, it was decreed by said Court that said mortgages or trust deeds be foreclosed, and that the said Oregon Southern Improvement Company do, within ten days from the date of said decree, pay to said William J. Rotch and Edward D. Mandell, the sum of \$1,516,666.66, with interest thereon at the rate of 6 per cent per annum, from the date of said decree, until paid, together with the costs and disbursements of said suit, and that in default thereof, one of the Masters of said Court, to-wit: George H. Durham, proceeded to sell, in manner and form, as upon an execution issued upon a judgment at law, all the right, title and interest which the said Oregon Southern Improvement Company had at the date of the execution of said decree, in or to certain property in said decree particularly described, including all of the

lands conveyed to said Oregon Southern Improvement Company, from the Coos Bay Wagon Road Company, as hereinbefore set forth.

Thereafter and on the 23rd day of June, A. D. 1887, at Empire City, in said Coos County, State of Oregon, pursuant to the premises, said George H. Durham, as Master of said Court, as aforesaid, did sell to said William J. Rotch, and one William W. Crapo, all of the property, real, personal and mixed, of said Oregon Southern Improvement Company, including its right, title and interest in and to said lands conveyed to said Oregon Southern Improvement Company, by the Coos Bay Wagon Road Company, as hereinbefore set forth, and the price purported to have been paid by said purchasers for said property was the sum of \$120,000.00.

Thereafter, and on or about the 16th day of November, A. D. 1887, the said George H. Durham, as Master of said Court, as aforesaid, did execute, and deliver to said William J. Rotch, and William W. Crapo, a certain instrument in writing, to-wit: a Master's Deed of Conveyance, purporting to convey to said William J. Rotch, and William W. Crapo, pursuant to said sale, all the right, title and interest that the said Oregon Southern Improvement Company, title and interest that the said Oregon Southern Improvement Company, had at the date of said deeds of trust, or mortgages respectively, in and to the lands conveyed to said Oregon Southern Improvement Company, as hereinbefore set forth.

On or about the 14th day of December, A. D. 1887, the said William J. Rotch and Clara M. Rotch, his wife, and said William W. Crapo, and Sarah T. Crapo, his wife, did, for a nominal consideration, execute, and deliver to the defendant Southern Oregon Company, all of the property purported to be conveyed to said William J. Rotch, and said William W. Crapo, by said George H. Durham, as Master of said Court aforesaid.

XV.

In all of the transactions hereinbefore set forth, as to them, or either of them, the said William J. Rotch, Edward D. Mandell, and William W. Crapo, acted as confederates, and as the agents and for the benefit of said Oregon Southern Improvement Company, and Southern Oregon Company, and the officers, stock-holders and owners thereof.

That said defendant Southern Oregon Company, was organized by the officers, stock-holders and owners of said Oregon Southern Improvement Company, and was in truth and in fact, but a re-organization of said last named corporation, and the stock-holders of the defendant Oregon Southern Company, were identical with the former stock-holders of said Oregon Southern Improvement Company, and their respective interests in said defendant Southern Oregon Company, were proportionately identical with their former respective interests in said Oregon Southern Improvement Company.

That the aforesaid deeds of trust, or mortgages, executed, and delivered, to said Boston Safe Deposit and

Trust Company, were executed, and delivered for the benefit and use of the officers, stockholders, and owners of said Oregon Southern Improvement Company, and the alleged indebtedness secured by said mortgages or trust deeds was fictitious, feigned and untrue, and represented the interests of the stockholders, or certain thereof, of said Oregon Southern Improvement Company, and said mortgages executed and delivered to said Boston Safe Deposit and Trust Company, as aforesaid, were executed, delivered, and foreclosed, and caused to be executed, delivered, and foreclosed by the officers, stockholders, and owners of said Oregon Southern Improvement Company, with the intent, and in the hope, that by the aforesaid foreclosure sale, the aforesaid restrictions upon the sale and disposition of said granted lands might be evaded and defeated, and that the aforesaid conditional estate and trust created by said Act of Congress, approved March 3, A. D. 1869, might be converted into an unconditional estate, for the use and benefit of the said officers, stockholders and owners of said Oregon Southern Improvement Company.

That none of said alleged bonds purported to have been secured by the aforesaid deeds of trust, or mortgages, were held, or owned, by others than the said officers, stockholders and owners of the Oregon Southern Improvement Company.

That the aforesaid alleged price, purported to have been paid at said foreclosure sale, (except such part thereof as was necessary to defray the expenses and

costs of said judicial proceedings) were in fact paid, if at all, by the aforesaid officers, stockholders and owners of the said Oregon Southern Improvement Company, unto themselves, and constituted a mere nominal transaction, designed and executed by the parties thereto for the purpose hereinbefore mentioned. For the reasons hereinbefore set forth, the execution, delivery, and foreclosure of said deeds of trust and mortgages, and the aforesaid foreclosure sale thereunder, involved no actual change of interest whatsoever in the ownership of said lands, or any part thereof, but said acts were all done by and between the parties thereto, for the purpose of fraudulently perfecting the title to said granted lands to themselves, by and through the medium of defendant corporation, the Southern Oregon Company.

XVI.

That of all said lands so granted by said Act of Congress, and the Legislature of the State of Oregon, are situated in one of the most wealthy sections of the State of Oregon, and constitute or make a strip or tract of land approximately twelve miles wide, extending from Coos Bay to Roseburg, Oregon, and the defendant, Southern Oregon Company, now, by virtue of all of said fraudulent acts, hereinbefore stated, wrongfully, unlawfully, and fraudulently asserts, and assumes to exercise and enjoy, an unconditional estate in fee simple, in and to all of said lands so granted, as aforesaid, including the lands involved in this suit, notwithstanding that said defendant,

Southern Oregon Company, and each and all of its predecessors in interest, had a full and complete knowledge of all the conditions, and restrictions, affecting said lands, and of the title to said lands, and all of said parties, and each of them, knew of each, and all of the fraudulent transactions affecting said lands that had theretofore transpired, as is hereinbefore set forth and stated.

XVII

That the defendant, the State of Oregon, by virtue of accepting said grant of lands from the United States of America, as is hereinbefore set forth, and stated, became, and now is, a co-trustee with defendant, Southern Oregon Company, of all of said lands, and by reason of the acceptance of said express trust, and its implied copartnership with the Southern Oregon Company, has waived its immunity from suit or action in the duly constituted courts of the United States of America; and by reason of its interest and estate in said lands has diverted itself, so far as concerns transactions immediately connected with said trust property, of its sovereign character, and is subject to the jurisdiction of this court, in all things pertaining thereto, or in anywise connected with said granted lands.

That the true title to all of said granted lands is now in the State of Oregon, except such fraudulent and pretentious, right as defendant, Southern Oregon Company, at this time, wrongfully, unlawfully, and fraudulently holds, as an involuntary trustee, of a

constructive trust, as stated in this complaint; and the United States of America has never by public act, or otherwise, directly or indirectly, revoked or abrogated said express trust, as to the State of Oregon, and the State of Oregon has never renounced said trust or denied it, and said trust remains, and now is, in full force and effect, and is in the same legal position or situation, as to title, as it was on the 3rd day of March, 1869, upon which date said lands were granted as heretofore stated.

That defendant, Southern Oregon Company, has been duly tendered the sum of two dollars and fifty cents per acre, for all their interest in the lands involved in this suit, and a demand has been duly made for a conveyance of all their interest in and to said lands to complainants herein, and an offer has been duly made to reimburse it for all taxes and paid on said lands, but said defendant has, at all times, refused to accept said purchase price, and to deliver a deed, or recognize said offer in any way, manner, shape or form, or to do anything whatsoever in the premises, except to fraudulently hold said lands unto themselves, as stated in this complaint, and any and all tenders of money, or demands for deeds, have been, and still are contemptuously refused, but said demand and tender is renewed, and again made and offered in this complaint, for said lands, and payment will be made when a decree is rendered in the premises as prescribed by law.

That defendant, the State of Oregon, has hereto-

fore permitted said defendant, Southern Oregon Company, and its predecessors in interest, to hold and possess these lands in the manner set forth in this complaint, and has heretofore failed, neglected and refused to proceed against the conspirators who control defendant, the Southern Oregon Company, to wrest the lands described in this complaint from said corrupt defendant, and for that reason the State of Oregon is made a party defendant in this suit, not against it in its sovereign capacity, but as a co-trustee with defendant, Southern Oregon Company; and with the sole object of affecting the trust property involved, and with no intent to involve any other matter or thing, whatsoever, belonging to or controlled by defendant, State of Oregon.

XVIII.

That by virtue of the matters and things in this bill of complaint set forth and stated, the defendant, Southern Oregon Company, is an involuntary trustee of all the lands involved in this suit, and said lands fraudulently acquired, as stated in this complaint, by the defendant Southern Oregon Company, constitute and are held as a constructive trust, by said defendant, with no title or estate in or to the same, in said defendant, Southern Oregon Company, whatsoever, except such title as it has acquired by fraud as herein stated.

XIX.

Your orators further say, in anticipation, that neither the Statute of Limitations, nor the analogous

doctrine of laches apply in this case, for the reason that the defendant, Southern Oregon Company, is fraudulently holding said lands involved in this suit in subordination to the paramount title of the defendant, State of Oregon; and by reason of all matters and things in this bill of complaint set forth and stated, neither the Statute of Limitations, nor laches, can be invoked by defendant, Southern Oregon Company, for that; its fraudulent title, and the fraudulent title of all its predecessors, in interest, were not exclusive of any higher right, but always was, and now is, subject to the superior, right, title, interest, and estate of the said defendant, State of Oregon, and of your orators herein who are beneficiaries in said grant by virtue of the terms of said express trust in the State of Oregon, as is evidenced by exhibits "A" and "B" hereunto attached, and made a part of this complaint, to which reference is hereby made.

XX.

That your orators further say and show unto your honors, that by virtue of their applications for said lands, as is more particularly set forth and stated in this complaint, they are, in relation to said trust, in privity with the State of Oregon, trustee of all of said lands involved in this suit, and that the defendant, Southern Oregon Company, and all its predecessors in interest, did, by virtue of each, and all the acts set forth in this bill of complaint, directly and indirectly accept, and assent to all the terms, restrictions, limitations and conditions contained in said Act of the

Legislature of the State of Oregon approved on or about the 22nd day of October, 1870, which is marked exhibit "B" and made a part of this bill of complaint, and said defendant Southern Oregon Company and its predecessors in interest did accept and assent to the tenor, effect, restrictions and limitations of the Acts of Congress, marked exhibits "A" and "C" and made a part of this complaint, and did particularly assent to and accept that proviso or restriction in the public law which reads as follows: *Provided, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already titled*, and by said acts on the part of said defendant, Southern Oregon Company, and all its predecessors in interest, it did recognize, have full knowledge of, and accept and assent to all of said Granting Acts, which were and now are public laws, and did admit their full force and effect, and your orators insist and submit that the defendant, Southern Oregon Company, and the State of Oregon are bound by the terms, conditions, restrictions, and limitations, in said express trust contained, and defendant, Southern Oregon Company, is estopped in equity and good conscience to claim any interest, estate or title of any nature whatsoever against complainants, in or to any of said lands involved in this suit, by virtue of said acts hereinbefore, and hereinafter set forth and stated and by virtue of the tenor and effect of the government patents, and the contents of the same.

XXI.

That prior to the commencement of this suit a demand has been duly made on the defendant, Southern Oregon Company, and the defendant, State of Oregon, for a deed to the lands hereinafter set forth and described, by the respective plaintiffs herein, and that said plaintiffs have also duly tendered to the defendant, Southern Oregon Company, the sum of \$2.50 per acre, as required by statute, for defendants interest (not admitting that they have any estate) in said lands, and that by virtue of said demand and tender, plaintiffs are entitled to a deed, or a decree quieting title, as the case may be, for said lands, to the respective parties hereinafter set forth, to-wit:

D. T. BATEMAN

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-six (26) South; Range Twelve (12) West, Willamette Meridian.

R. R. KNICKERBOCKER

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South; Range Twelve (12) West, Willamette Meridian.

SARAH FUNGE

The Southwest quarter (S. W. $\frac{1}{4}$) of Section One (1); Township Twenty-seven (27) South; Range Twelve (12) West, Willamette Meridian.

GEORGE O. MATSON

The Northwest quarter (N. W. $\frac{1}{4}$) of Section One (1); Township Twenty-eight (28) South, Range Nine (9) West, Willamette Meridian.

GUSSIE R. SMITH

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirteen (13); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

WALTER H. COHICK

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

P. J. WILLIAMS

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

W. H. IRWIN

The Southeast quarter (S. E. $\frac{1}{4}$) Section Twenty-five (25); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

M. F. HOPKINS

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-seven (27); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

WILLIAM L. BUNKER

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Twenty-seven (27); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

THOMAS J. LOWE

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

DAISY D. GRISSIM

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Twelve (12) West, Wilamette Meridian.

O. P. ROSLAND

The Northeast quarter (N. E. $\frac{1}{4}$) of Section One (1); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

A. S. J. SMITH

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

HARRY HUFFMAN

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Twenty-nine (29); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

CHARLES W. KNICKERBOCKER

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Five (5); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

LEAL DAVIS

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Thirteen (13); Township Twenty-eight (28) South, Range Nine (9) West, Willamette Meridian.

E. B. FONTAINE

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

H. W. JACKSON

The Northwest quarter (N. W. $\frac{1}{4}$) of Section One

(1); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

CATHERINE E. DONAVAN

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South Range Eleven (11) West, Willamette Meridian.

CLARA P. KNICKERBOCKER

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

W. J. O'BRIEN

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

J. O. WARNER

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

A. O. PEGG

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-eight (28) South, Range Eleven (11) West, Willamette Meridian.

S. L. WILEY

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

HENRY S. LATHROP

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-nine (29); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Merid-

ian.

F. G. BUSH

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Fifteen (15) Township Twenty-eight (28) South, Range Nine (9) West, Willamette Meridian.

WILLIAM ROWE

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

A. S. KELLY

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-nine (29) South, Range Nine (9) West, Willamette Meridian.

L. F. STRUCKMEIER

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirteen (13); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

WILLIAM F. DIXEY

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

A. ALTENBURG

The North half (N. $\frac{1}{2}$) of the Northwest quarter (N. W. $\frac{1}{4}$) and Southwest quarter (S. W. $\frac{1}{4}$) of the Northwest quarter (N. W. $\frac{1}{4}$) and Northwest quarter (N. W. $\frac{1}{4}$) of the Southwest quarter (S. W. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

NINA BOUCHER

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirty-Three (33); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

M. J. GLENNON

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

EUGENE KNICKERBOCKER

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Thirty-three (33) Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

SAMUEL F. GRISSIM

The Northeast quarter (N. E. $\frac{1}{4}$) of Section One (1); Township Twenty-eight (28) South, Range Nine (9) West, Willamette Meridian.

BLANCHE G. BUNKER

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Nine (9); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

IRVING KNICKERBOCKER

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Thirty-three (33); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

FRED M. STERN

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

COLIN HILL

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Elev-

en (11); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

ALBERT QUICK

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Three (3); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

LISTON CLARK

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Thirty-five (35); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

JAMES L. DUTTON

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirteen (13); Township Twenty-eight (28) South, Range Nine (9) West, Willamette Meridian.

W. M. MORAN

The Southeast quarter (S. E. $\frac{1}{4}$) of Section One (1); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

P. D. PARTRIDGE

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Nine (9); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

AGNES HUFFMAN

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

H. C. HITCHINGS

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirty-five (35); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

AGNES DE CRAY

The South half (S. $\frac{1}{2}$) of the Northeast quarter (N. E. $\frac{1}{4}$) and North half (N. $\frac{1}{2}$) of the Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-seven, Township Twenty-seven (27) South, Range Thirteen (13) West Willamette Meridian.

E. P. HICKEN

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Nine (9); Township Twenty-eight (28) South, Range Eleven (11) West, Willamette Meridian.

W. G. CONKLIN

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Thirty-three (33); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

MARY S. BREWER

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Thirty-five (35); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

O. M. PRICKETT

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

H. E. WATSON

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

THOMAS A. PLACE

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Nine (9); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

GEORGE M. BRISTOW

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Three (3); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

F. C. WILLSON

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-seven (27); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

B. WATERS

The South half (S. $\frac{1}{2}$) of the Southeast quarter (S. E. $\frac{1}{4}$) and the Northwest quarter (N. W. $\frac{1}{4}$) of the Southeast quarter (S. E. $\frac{1}{4}$) and the Northeast quarter (N. E. $\frac{1}{4}$) of the Southwest quarter (S. W. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

H. G. SPARGAR

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Thirty-one (31); Township Twenty-seven (27) South, Range Eleven (11) West, Wilamette Meridian.

ROBERT B. HILL

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

C. W. HILL

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

K. C. HILL

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

L. D. HILL

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

WILLIAM P. HILL

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

EMMA HILL

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

H. J. GODFREY

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Twenty-seven (27); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

ALONZA S. BREWER

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

W. P. HITCHINGS

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Fifteen (15); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

W. A. ATWOOD

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Five

(5); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

F. W. HITCHINGS

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

HENRY D. HALL

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Thirty-five (35); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

CORA M. PARKER

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirty-five (35); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

F. L. LEWIS

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

ANNA L. STACY

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

F. H. PARKER

The North half (N. $\frac{1}{2}$) of the Southeast quarter (S. E. $\frac{1}{4}$) and the Southwest quarter (S. W. $\frac{1}{4}$) of the Southeast quarter (S. E. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

J. B. BREWER

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Thir-

teen (13); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

JAMES A. COHOE

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Nine (9); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

F. A. DeCRAY

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

POLLY A. HITCHINGS

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

E. A. WAKELEY

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Fifteen (15); Township Twenty-eight (28) South, Range Nine (9) West, Willamette Meridian.

HARRIET R. LEE

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Seven (7); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

WILLIAM R. HARDWICK

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

THOMAS LANE

The West half (W. $\frac{1}{2}$) of the Northeast quarter (N. E. $\frac{1}{4}$) and the Southeast quarter (S. E. $\frac{1}{4}$) of the Northeast quarter (N. E. $\frac{1}{4}$) and the Northeast

quarter (N. E. $\frac{1}{4}$) of the Southeast quarter (S. E. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-eight (28), Range Twelve (12) West, Willamette Meridian.
H. W. KLOTZ

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Five (5); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

GEORGE BUTLER

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

J. H. DALE

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Thirteen (13); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

MARGARET SIMMERS

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Five (5); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

W. E. SIMMERS

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Five (5); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

M. S. PRICE

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Three (3); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

D. C. BERRY

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-nine (29); Township Twenty-seven (27)

South, Range Eleven (11) West, Willamette Meridian.

JAMES S. WIGGINS

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

THOMAS R. HANCOCK

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Three (3); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

M. J. GATES

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

W. R. WOODWARD

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

MARY ORR MINER

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Twenty-five (25); Township Twenty-seven (27) South, Range Thirteen (13) West, Willamette Meridian.

O. A. HOTCHKISS

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Five (5); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

R. C. SADLER

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Nine-

teen (19); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

W. A. RICKEY

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Three (3); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

FRANK A. GIBSON

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

HENRY BEAL

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

C. C. LYON

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Three (3); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

R. G. EDWARDS

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Twenty-nine (29); Township Twenty-seven (27); Range Eleven (11) West, Willamette Meridian.

REY MOAD

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Thirty-one (31); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

WALLACE E. MOAD

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Thirteen (13); Township Twenty-six (26) South, Range Twelve (12) West, Willamette Meridian.

W. H. CONE

The Northwest quarter (N. W. $\frac{1}{4}$) of Section Five (5); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

C. H. PARKER

The Southeast quarter (S. E. $\frac{1}{4}$) of Section Nine (9); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

T. W. PACK

The Northeast quarter (N. E. $\frac{1}{4}$) of Section Thirty-three (33); Township Twenty-five (25) South, Range Twelve (12) West, Willamette Meridian.

MARY WAKELEY

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Thirty-three (33); Township Twenty-five (25), Range Twelve (12) West, Willamette Meridian.

C. H. COVEY

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Seventeen (17); Township Twenty-eight (28) South, Range Twelve (12) West, Willamette Meridian.

JENNIE A. EDWARDS

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Nineteen (19); Township Twenty-seven (27) South, Range Eleven (11) West, Willamette Meridian.

W. R. JONES

The Southwest quarter (S. W. $\frac{1}{4}$) of Section Eleven (11); Township Twenty-eight (28) South, Range Eleven (11) West, Willamette Meridian.

J. B. BAIS

Northwest quarter (N. W. $\frac{1}{4}$) Section Seven (7);

Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

ELLA C. ROLLINS

Southeast quarter (S. E. $\frac{1}{4}$) of Section Twenty-seven (27); Township Twenty-seven (27) South, Range Twelve (12) West, Willamette Meridian.

XXII.

That heretofore, and on or about the _____ day of _____ 1908, the United States of America brought suit against the Southern Oregon Company, for the District of Oregon, to forfeit to the Government of the United States of America, all of the granted lands herein described, now held by the defendant Southern Oregon Company, including the lands involved in this suit. That said suit so brought by the United States of America, was based upon a joint resolution of Congress, approved April 30, A. D., 1908, a copy of which said joint resolution is hereunto attached, marked Exhibit "D" and made a part of this complaint, but your orators submit that said joint resolution did not revoke, in any way, manner, shape or form, or affect the rights of the State of Oregon, in and to the lands involved in this suit, or any other lands within said Coos Bay Wagon Road Grant, and said joint resolution is ineffectual, for all purposes, to defeat the rights of the State of Oregon, as such trustee in any and all of said lands. That your orators are informed and believe and therefore allege that subsequent to bringing said suit the Department of Justice of the United States of America has permitted

the Southern Oregon Company to log off portions of said lands and appropriate the proceeds to its own use. That defendant, Southern Oregon Company, has been and is, by and through certain parties by the name of Aason and one Herbert Armstrong continuing to log off and strip portions of said granted lands, and said Southern Oregon Company will continue to fraudulently log off and strip said lands and appropriate the proceeds from the sale of said timber to its own use and benefit to the irreparable injury of your orators, and the State of Oregon, unless a receiver is appointed to take charge of said property, or an injunction is issued out of this court to prevent the continuance of this fraud. That the said John Doe Aason and Richard Roe Aason, whose true names are unknown to your orators, are insolvent and unable to respond in damages, and are but hired servants, confederates or dummies of defendant, Southern Oregon Company, through whom said timber is so removed for the benefit of defendant, Southern Oregon Company, and the said Southern Oregon Company is receiving the sum of \$2.00 per thousand feet for all of said timber so removed through said John Doe Aason and Richard Roe Aason, and your orators and all others interested, are wholly without relief unless said defendant, Southern Oregon Company, and all its dummies, confederates, agents, servants, attorneys and representatives are restrained from despoiling and logging off the granted lands aforesaid, in which the lands involved in this suit are included, as herein-

before stated in this complaint.

That the said John Doe Aason and Richard Roe Aason as confederates of the Southern Oregon Company have been operating on this land, as aforesaid, for about the period of three years, and have, with the knowledge of the Department of Justice of the United States of America, despolied and wrongfully appropriated to themselves, for the benefit of the Southern Oregon Company, large quantities of timber, and that it would be a vain and useless act to attempt to obtain an accounting of any nature whatsoever from either defendant, Southern Oregon Company, or John Doe Aason and Richard Roe Aason, the dummies and confederates of said Southern Oregon Company, and that a receiver is necessary for and on account of said misappropriation of the proceeds from the sale of timber, to investigate and render a true account of all moneys received from the sale of said timber, by the Southern Oregon Company, and to turn the same into this court to abide its decision, as to the true ownership of said money, whatever the amount may be, and which said amount is wholly unknown to your orators.

XXIII.

Complainants further say and show unto your honors that they are without any plain, speedy or adequate remedy at law, and bring this suit in equity to avoid a multiplicity of ineffectual actions at law against said defendant, Southern Oregon Company, which said actions at law, if so brought, would be ut-

terly worthless and of no effect, and would constitute vain and useless efforts on complainants' part to obtain redress. That each and all of the acts complained of in this complaint are contrary to equity and good conscience, and tend to the manifest injury of complainants.

That the value of each individual claim of one hundred and sixty acres of land, involved in this suit, and claimed by the respective claimants herein, is over the sum of two thousand dollars, exclusive of interest and costs.

That a federal question is independently raised by this Bill of Complaint, requiring a construction and interpretation of said federal statutes, herein referred to.

Your orators further say unto your honors, that in consideration of the premises hereinbefore stated, and inasmuch as complainants are entirely remedyless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where such matters are properly cognizable and relievable, and to obtain a discovery, and to the end therefor, that said defendant, may, if they can, show why your orators cannot have the relief hereby prayed, and may, (answer under oath being specially waived), according to the best and utmost of their respective knowledge, information, and belief, full, true and perfect answer make to all of the allegations in this Bill of Complaint, set forth and stated.

WHEREFORE: First: Complainants pray that

this court interpret and construe the Act of Congress, referred to in this Complaint, and approved March 3, 1869, and all acts supplementary thereto, and the Act of the Oregon Legislature, accepting the trust conveyed to the State of Oregon by virtue of said Act.

Second: That this court finally and for all purposes wind up and settle the trust described in this complaint; fully ascertaining and definitely settling and adjusting the rights of all parties interested therein.

Third: That an injunction issue out of this court interdicting any further depredations upon the property involved in this suit.

Fourth: That a receiver be appointed to take charge of, and investigate all logging operations carried on by John Doe and Richard Roe Aason, as confederates, or otherwise, of defendant, Southern Oregon Company, and to collect and account for all moneys unlawfully and wrongfully obtained by defendant, Southern Oregon Company, from timber logged off from any lands involved in this suit, and appropriated to themselves, or any other party in collusion with the defendant, Southern Oregon Company.

Fifth: That a decree be duly made and entered, requiring defendant, Southern Oregon Company, to quit claim, or release all its right, title, interest and estate of every nature whatsoever, in and to the lands involved in this suit, to the respective claimants thereof, as set forth in this Bill, and as their interests may appear at the final determination of this suit.

Sixth: That if the said defendant, Southern Oregon Company, fail, neglect, or refuse to promptly obey the decree of this court, so made, that the decree of this court stand as a conveyance of said lands to the party entitled thereto, and be, in effect, and to all intents and purposes, legal and equitable, a complete conveyance of all the Southern Oregon Company's title or claim of title in and to said lands, and to have this further effect: to absolutely and forever bar said defendant of any estate in and to any property included in the decree of this court, and that plaintiffs have all further rights and remedies under rule (8) of this court.

Seventh: That when a final decree is entered in this suit, that the temporary injunction prayed for herein be made permanent.

Eighth: That the receiver appointed in this case be given power subject to confirmation by this court, to acquire possession of, to handle and dispose of the entire land grant, known as the Coos Bay Wagon Road Grant, now held by defendant, Southern Oregon Company, and that such receiver be authorized by decree of this court to make such conveyance of said lands as the court shall direct to the parties entitled thereto, and that the trust now reposed and being in the State of Oregon, be duly administered by this court and finally wound up and adjusted in the manner provided by law.

Ninth: That Complainants have such other and further relief as to this court may seem equitable,

meet, and just in the premises.

Tenth: That Complainants have judgment for their costs and disbursements in this suit.

May it please your honors to grant unto Complainants the Writ of Subpoena of the United States of America, directed to the Southern Oregon Company, Oswald West and A. M. Crawford, commanding them on a certain day and under a certain penalty, to be and appear in this court, then and there to answer the premises, and to stand to and abide by, such order and decree as may be made against them, and your complainants will ever pray.

T. S. MINOT,

Solicitors for Complainants.

UNITED STATES OF AMERICA, District of Oregon,

County of Multnomah,—ss.

I, T. S. Minot, being first duly sworn, on my own behalf and on behalf of the other complainants in the above entitled suit, depose and say: That I am the attorney for said Complainants; that I have read the foregoing Bill of Complaint and know the contents thereof, and that the same is true to my own knowledge, except as to the matters which are therein stated on information and belief and as to those matters, I believe it to be true.

That my reason for verifying this complaint is as follows:

I am personally acquainted with all the facts set forth in said Bill of Complaint, having thoroughly in-

vestigated the same during the past six years, and none of the complainants in said Bill are as well informed concerning the allegations in said Bill as I am. That I am in possession of necessary and material documents and copies of instruments and evidence that no one else possesses, and am therefore better qualified to verify said Complaint than any other person, and for the above reasons said verification is made by myself, as such attorney for said complainants.

T. S. MINOT.

Subscribed and sworn to before me this 28th day of July, 1913.

(SEAL)

M. A. SHILTON,
Notary Public for Oregon.

EXHIBIT "A"

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon-road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road; Provided, That the lands designated by odd numbers, to the extent of three sections in width on each side of said road: Provided, that the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed

of only as the work progresses: And provided further, That any and all lands heretofore reserved to the United States, or otherwise appropriated by Act of Congress or other competent authority, be, and the same are hereby reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: And provided further, that the grant hereby made shall not embrace any mineral lands, or any lands to which homestead or pre-emption rights have attached.

Sec. 2. And be it further enacted, That the lands hereby granted to said State shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

Sec. 3. And be it further enacted, That said road shall be constructed with such width, graduation and bridge as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

Sec. 4. And be it further enacted, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States, nor otherwise disposed of, and not exceeding six

miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this act.

Sec. 5. And be it further enacted, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sale shall be made, and the lands remaining unsold shall revert to the United States; Provided, however, that the entire amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

Sec. 6. And be it further enacted, That the United States surveyor general for the district of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect.

EXHIBIT "B"

Be it enacted by the Legislative Assembly of the State of Oregon,

Section One: That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights-of-way, privileges, and immunities heretofore granted

or pledged to this State by the Act of Congress, in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the conditions and limitations therein prescribed.

Section Two: There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes and upon the conditions and limitations mentioned in said Act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

Section Three: Inasmuch as there is no law upon this subject at the present time this act shall be in force from and after its passage.

EXHIBIT "C".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the State of Oregon, as in said act provided, to have been constructed and completed, patents for said lands shall issue in due form to The State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which

case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: Provided, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.

EXHIBIT "D"

"That the Attorney-General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following-described Acts of Congress, to-wit: also "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State, approved March third, eighteen hundred and sixty-nine; including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said acts; and in and by any and all such suits, actions, or proceedings the Attorney-General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of

said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney-General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions or proceedings may be instituted or pending to entertain, consider and adjudicate the claim and right of the United States to such forfeiture or forfeitures, **and if found to enforce the same**; Resolved further, That the authority and direction hereinbefore given shall extend to any and all suits, actions or proceedings which may be instituted or pending under the authority of the Attorney-General at the time of the adoption and approval hereof."

[Endorsed]: Bill of Complaint. Filed July 29, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 18 day of August, 1913, there was duly filed in said Court, a Motion to Dismiss, in words and figures as follows, to wit:

[Motion of Southern Oregon Co. to Dismiss Bill of
Complaint.]

*In the District Court of the United States for the
District of Oregon.*

D. T. BATEMAN, et al,

Plaintiffs,

vs.

SOUTHERN OREGON CO., et al,

Defendants.

The defndant, Southern Oregon Company, by its Solicitors, moves the Court to dismiss plaintiff's bill, for the following reasons:

I.

Misjoinder of parties plaintiff. It does not show on the face of said bill that the parties plaintiff therein have any joint interest in the property which is the subject of the suit. (Equity rule 26.)

II.

Misjoinder of parties defendant.

III.

It appears upon the face of the bill that the suit is barred by the statute of limitations and by laches.

IV.

The bill does not state facts sufficient to constitute a valid cause of action in equity. (Equity rule 29.)

DOLPH. MALLORY, SIMON & GEARIN,

Solicitors for defendant,

SOUTHERN OREGON COMPANY.

[Endorsed]: Motion to dismiss Bill of Complaint.

Filed Aug. 18, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 21 day of August, 1913,
there was duly filed in said Court, Motion to Dis-
miss, in words and figures as follows, to wit:

[Motion of State of Oregon to Dismiss Bill of
Complaint.]

*In the District Court of the United States for the
District of Oregon.*

D. T. BATEMAN, et al,
Plaintiffs,
vs.
SOUTHERN OREGON CO., et al,
Defendants.

Come now the defendants, the State of Oregon,
Oswald West, as Governor of Oregon, and A. M.
Crawford as Attorney General of Oregon, and by
their attorneys move the court to dismiss plaintiffs'
bill for the following reasons:

I.

Misjoinder of parties plaintiff. It does not show on
the face of said bill that the parties plaintiff therein
have any joint interest in the property which is the
subject of the suit. (Equity rule 26.)

II.

Misjoinder of parties defendant.

III.

It appears upon the face of the bill that the suit is barred by the statute of limitations and by laches.

IV.

The bill does not state facts sufficient to constitute a valid cause of action in equity. (Equity rule 29.)

A. M. CRAWFORD,

Attorney General.

JAMES W. CRAWFORD,

Assistant.

Attorneys for the above named
defendants.

[Endorsed]: Motion to dismiss Bill of Complaint.
Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 15 day of September, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Judgment of Dismissal.]

*In the District Court of the United States for the
District of Oregon.*

No. 6084.

D. T. BATEMAN, et al,

vs.

SOUTHERN OREGON COMPANY, et al.

This cause came on regularly for hearing at this time upon motion to dismiss, Mr. Joseph Simon ap-

pearing as attorney for defendant, there being no appearance on behalf of complainants; whereupon, said motion having been duly argued and submitted, after due consideration, it is ordered that said motion to dismiss be and the same hereby is granted.

It is therefore ordered, adjudged and decreed that this cause be and the same hereby is dismissed and said defendants have and recover of and from the complainants herein their costs and disbursements taxed herein at \$20.90.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Decree. Filed Sept. 15, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of January, 1914, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

(Title)

To the Honorable Charles E. Wolverton, Presiding Judge in the Above Entitled Court.

The petition of D. T. Bateman, R. R. Knickerbocker, Sarah Funge, George O. Matson, Gussie R. Smith, Walter H. Cohick, P. J. Williams, W. H. Irwin, M. F. Hopkins, William L. Bunker, Thomas J. Lowe, Daisy D. Grissim, O. P. Rosland, A. S. J. Smith, Harry Huffman, Catherine E. Donavan, Clara P. Knicker-

bocker, W. J. O'Brien, J. O. Warner, A. P. Pegg, S. L. Wiley, Henry S. Lathrop, F. G. Bush, William Rowe, A. S. Kelly, L. F. Struckmeier, William F. Dixey, A. Altenburg, Nina Boucher, M. J. Glennon, Eugene Knickerbocker, Samuel F. Grissim, Blanche G. Bunker, Irving Knickerbocker, Fred M. Stern, Colin Hill, Albert H. Quick, Liston Clark, James L. Dutton, W. M. Moren, P. D. Partridge, Agnes Huffman, H. C. Hitchings, Agnes DeCray, E. P. Hicken, W. G. Conklin, Mary S. Brewer, O. M. Prickett, H. E. Watson, Thomas A. Place, George M. Briston, F. C. Willson, S. W. Waters, H. G. Spargar, Robert B. Hill, E. A. Wakeley, Harriet R. Lee, William R. Hardwick, Thomas Lane, H. R. Klotz, George Butler, J. H. Dale, Margaret Simmers, W. E. Simmers, M. S. Price, D. C. Berry, James S. Wiggins, Thomas R. Hancock, M. J. Gates, W. R. Woodward, Mary Orr Miner, O. A. Hotchkiss, R. C. Sadler, W. A. Rickey, Frank A. Gibson, Alfred Williams, Henry Beal, C. C. Lyon, R. G. Edwards, Rey Moad, Wallace Moad, W. H. Cone, C. H. Parker, T. W. Pack, Mary L. Wakeley, C. H. Covey, Jennie A. Edwards, W. R. Jones, J. B. Bais, Ella C. Rollins, complainants in the above entitled cause respectfully shows and represents:

That they desire an order allowing an appeal from the final decree heretofore entered in this cause, to the United States Circuit Court of Appeals, for the Ninth Circuit, and:

Feeling themselves aggrieved by the final decree, heretofore made and entered by this court, in this

cause on the 15th day of September, 1913, whereby it was ordered, adjudged and decreed that said cause be dismissed, and that the said defendants have judgment against the said complainants, for their costs amounting to \$20.90; comes now T. S. Minot, Esq., solicitor and counsel for said petitioners and petitions this court for an order allowing said complainants to prosecute an appeal from said final decree to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors on file herein and under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the complainant shall give and furnish upon such appeal and your petitioner will ever pray, etc.

Dated January 19, 1914.

T. S. MINOT,
Solicitor for Complainants.

E. L. C. FARRIN,
of Counsel.

[Endorsed]: Petition for Appeal. Filed Jan. 20, 1914.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of January, 1914, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

(Title)

Now comes the above entitled complainants in error, D. T. Bateman, R. R. Knickerbocker, Sarah Funge, George O. Matson, Gussie R. Smith, Walter H. Cohick, P. J. Williams, W. H. Irwin, M. F. Hopkins, William L. Bunker, Thomas J. Lowe, Daisy D. Grissim, O. P. Rosland, A. S. Smith, Harry Huffman, Charles W. Knickerbocker, Leal Davis, E. B. Fontaine, H. W. Jackson, Catherine E. Donovan, Clara P. Knickerbocker, W. J. O'Brien, J. O. Warner, A. P. Pegg, S. L. Wiley, Henry S. Lathrop, F. G. Bush, William Rowe, A. S. Kelly, L. F. Struckmeier, William F. Dizey, A. Altenburg, Nina Boucher, M. J. Glennon, Eugene Knickerbocker, Samuel F. Grissim, Blanche G. Bunker, Irving Knickerbocker, Fred M. Stern, Colin Hill, Albert H. Quick, Liston Clark, James L. Dutton, W. M. Moran, P. D. Partridge, Agnes Huffman, H. C. Hitchings, Agnes DeCray, E. P. Hicken, W. G. Conklin, Mary S. Brewer, C. M. Prickett, H. E. Watson, Thomas A. Place, George M. Briston, F. C. Willson, B. W. Waters, H. G. Sparger, Robert B. Hill, E. A. Wakeley, Harriet R. Lee, William R. Hardwick, Thomas Lane, H. W. Klotz, George Butler, J. H. Dale, Margaret Simmers, W. E. Simmers, M. S. Price, D. C. Berry, James S. Wiggins, Thomas R. Hancock, M. J. Gates, W. R. Woodward, Mary Orr Miner, O. A. Hotchkiss, R. G. Sadler, W. A. Rickey, Frank A. Gibson, Alfred Williams, Henry Beal, C. C. Lyon, R. G. Edwards, Rey Moad, Wal-

lace Moad, W. H. Cone, G. H. Parker, T. W. Pack, Mary L. Wakeley, C. H. Covey, Jennie A. Edwards, W. R. Jones, J. B. Bais, Ella C. Rollins.

by T. S. Minot, their solicitor and counsel and specifies and files the following assignment of errors, upon which he will rely, upon his appeal from the order and decree made the 15th day of September, 1913, in the above entitled cause and say: that in the record and proceedings in the above cause there is manifest error in this, to-wit:

I.

The court erred for that; in sustaining defendant Southern Oregon Company's Motion to Dismiss, which said Motion was interposed to complainants' Bill of Complaint.

II.

The court erred for that; in sustaining defendants' State of Oregon, Oswald West and A. M. Crawford's Motion to Dismiss, which said Motion was interposed to Complainants' Bill of Complaint.

III.

The court erred for that; the Complainant in said cause, and the matter therein contained, was and is sufficient, in law and equity for said complainants to maintain their suit against said defendants, the Southern Oregon Company, State of Oregon, Oswald West and A. M. Crawford.

IV.

The court erred, for that; by said record it appears that said judgment of dismissal was given for said

defendants when said Motion to Dismiss should have been overruled and defendants required to answer.

V.

The court erred, for that; by said record it appears that complainants are entitled to the relief prayed for in said Bill of Complaint against these defendants, or such other relief as the court might in equity grant.

VI.

The court erred, for that; by said record and Bill of Complaint it appears that this court had jurisdiction to hear, try, and determine this action.

VII.

The court erred, for that; the record shows that said Bill of Complaint does state a cause of suit of which equity will take cognizance.

VIII.

The court erred, for that; the record shows that complainants have not a plain, adequate and complete remedy at law, from the matters and things in said Bill of Complaint set forth.

IX.

The court erred, for that; said Bill does not show a misjoinder of parties, plaintiff, for it expressly alleges that complainants are a voluntary unincorporated association.

X.

The court erred, for that; said record shows that there is no misjoinder of parties defendants, for the Complaint expressly alleges that the State of Ore-

gon and the Southern Oregon Company are co-trustees.

XI.

The court erred, for that; it appears from said Complaint that the suit is not barred by the Statute of Limitations, and said Complaint further shows that the analogous doctrine of Laches, does not apply, for the conditions existing in the Act constituting the trust are clinging conditions and wholly outside of the Statute of Limitations, or the doctrine of Laches.

XII.

The court erred, for that; said clinging condition alleged in said Complaint follows said land, no matter in whom title is found, and even into the hands of remote alienees. It is essentially a condition running with the land.

XIII.

The court erred, for that; this court has jurisdiction over the State of Oregon, as defendant, has alleged in said Complaint for said State has divested itself of its sovereign character, as to the subject matter of this suit, and its position is that of a private citizen, and co-trustee with defendant, Southern Oregon Company.

XIV.

The court erred, for that; said Bill of Complaint does state facts sufficient to constitute a valid cause of suit in equity for the administration of a trust, and for such other and further relief as to the court may seem equitable and just in the premises.

Dated January 19, 1914.

T. S. MINOT,

Solicitor for Complainants in Error.

E. L. C. FARRIN,

of Counsel.

[Endorsed]: Assignment of Errors. Filed Jan.. 20, 1914.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 20 day of January, 1914, there was duly filed in said Court, an Order allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

(Title)

On motion of T. S. Minot and E. L. C. Farrin, solicitors and of counsel for complainants, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of dismissal, heretofore filed and entered herein, on the 15th day of September, 1913, be, and the same is hereby allowed, and that a certified transcript of the record, and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals. It is further ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty dollars, as a bond for costs and damages on appeal.

Dated January 20, 1914.

CHAS. E. WOLVERTON,

District Judge.

[Endorsed]: Order Allowing Appeal. Filed Jan. 20, 1914.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of January, 1914, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

*In the District Court of the United States in and for the
District of Oregon.*

At a stated term of the District Court of the United States of America, for the District of Oregon, held at the Court Room in the United States Post Office Building, in the City of Portland, State of Oregon, on the 20th day of January in the year of our Lord One Thousand Nine Hundred and Fourteen.

Present: The Honorable CHARLES E. WOLVERTON, Presiding Judge in the above entitled Court.
D. T. BATEMAN, R. R. KNICKERBOCKER,
SARAH FUNGE, GEORGE O. MATSON,
GUSSIE R. SMITH, WALTER H. COHICK,
P. J. WILLIAMS, W. H. IRWIN, M. F.
HOPKINS, WILLIAM L. BUNKER,
THOMAS J. LOWE, DAISY D. GRISSIM,
O. P. ROSLAND, A. S. J. SMITH, HARRY
HUFFMAN, CHARLES W. KNICKER-
BOCKER, LEAL DAVIS, E. B. FON-
TAINÉ, H. W. JACKSON, CATHERINE E.

DONAVAN, CLARA P. KNICKERBOCKER, W. J. O'BRIEN, J. O. WARNER, A. P. PEGG, S. L. WILEY, HENRY S. LATHROP, F. G. BUSH, WILLIAM ROWE, A. S. KELLY, L. F. STRUCKMEIER, WILLIAM F. DIXEY, A. ALTENBURG, NINA BOUCHER, M. J. GLENNON, EUGENE KNICKERBOCKER, SAMUEL F. GRISIM, BLANCHE G. BUNKER, IRVING KNICKERBOCKER, FRED M. STERN, COLIN HILL, ALBERT H. QUICK, LISTON CLARK, JAMES L. DUTTON, W. M. MORAN, P. D. PARTRIDGE, AGNES HUFFMAN, H. G. HITCHINGS, AGNES DeCRAY, E. P. HICKEN, W. G. CONKLIN, MARY S. BREWER, O. M. PRICKETT, H. E. WATSON, THOMAS A. PLACE, GEORGE M. BRISTON, F. C. WILLSON, B. W. WATERS, H. G. SPARGAR, ROBERT B. HILL, E. A. WAKELEY, HARRIET R. LEE, WILLIAM R. HARDWICK, THOMAS LANE, H. W. KLOTZ, GEORGE BUTLER, J. H. DALE, MARGARET SIMMERS, W. E. SIMMERS, M. S. PRICE, D. C. BERRY, JAMES S. WIGGINS, THOMAS R. HANCOCK, M. J. GATES, W. R. WOODWARD, MARY ORR MINER, O. A. HOTCHKISS, R. C. SADLER, W. A. RICKEY, FRANK A. GIBSON, ALFRED WILLIAMS, HENRY BEAL, C. C. LYON, R. G. ED-

WARDS, REY MOAD, WALLACE MOAD,
W. H. CONE, C. H. PARKER, T. W. PACK,
MARY L. WAKELEY, C. H. COVEY, JEN-
NIE A. EDWARDS, W. R. JONES, J. B.
BAIS, ELLA C. ROLLINS, a voluntary unin-
corporated Association,

Plaintiffs,

vs.

THE SOUTHERN OREGON COMPANY, a priv-
ate corporation,

THE STATE OF OREGON, a political corporation,
OSWALD WEST, Governor of the State of Oregon,
A. M. CRAWFORD, Attorney General of the State
of Oregon,

Defendants.

United States of America, to Southern Oregon
Company, a private corporation, State of Oregon, a
political corporation, Oswald West, Governor of the
State of Oregon and A. M. Crawford, Attorney Gen-
eral for the State of Oregon, Greeting:

You are hereby notified that in a certain case in
equity in the United States District Court in and for
the District of Oregon wherein D. T. Bateman and
one hundred and eleven other persons, a voluntary
unincorporated association, are complainants, and the
Southern Oregon Company, a private corporation,
State of Oregon, a political corporation, Oswald
West, Governor of the State of Oregon and A. M.
Crawford, Attorney General for the State of Oregon,
are defendants, an appeal has been allowed the com-

plainants therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at the City and County of San Francisco, State of California thirty days after the date of this Citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in their behalf.

Witness the Honorable Charles E. Wolverton, Judge of the United States District Court for the District of Oregon, this 25th day of January, A. D. 1914.

CHARLES E. WOLVERTON,
United States District Judge.

United States of America,
State of Oregon,
County of Multnomah,—ss.

Due and legal service of the foregoing Citation on Appeal is hereby admitted in Multnomah County, Oregon, this 21st day of January, 1914 by receipt personally of a duly certified copy thereof.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Defendants
Southern Oregon Company.

United States of America,
State of Oregon,
County of Marion.—ss.

Due and legal service of the Foregoing Citation on Appeal is hereby admitted this 29th day of January, 1914, by receipt personally of a duly certified copy

thereof.

A. M. CRAWFORD,
Attorney for Defendants,
State of Oregon,
Oswald West, Governor of
the State of Oregon, and
A. M. Crawford, Attorney general
for the State of Oregon.

[Endorsed]: Citation on Appeal. Filed Jan. 30,
1914.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 16 day of
February, 1914, the same being the.....Judicial
day of the Regular November term of said Court;
Present: the Honorable CHAS. E. WOLVER-
TON, United States District Judge presiding,
the following proceedings were had in said cause,
to-wit:

[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

D. T. BATEMAN, et al.,

Plaintiffs,

v.

SOUTHERN OREGON COMPANY, et al,

Defendants.

Now, at this day, for good cause shown, it is Or-
dered that plaintiffs' time for filing the record and

docketing this cause in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including the 1st day of April 1914.

CHAS. E. WOLVERTON,
Judge.

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No. 2392

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. T. BATEMAN et al.,

Appellants,

vs.

SOUTHERN OREGON COMPANY

(a corporation), et al.,

Appellees.

BRIEF FOR APPELLANTS.

Statement of the Case.

The original grant of March 3, 1869, to the State of Oregon, by the United States of America, of certain lands to aid in the construction of a wagon road from Coos Bay, Oregon, to Roseburg, Oregon, was a grant *in presenti*, in trust, to be defeated only by breach of trust, or of conditions subsequent contained therein, or repeal of the Granting Act.

The Act granting these lands to construct this wagon road contains this condition subsequent, amongst others:

“provided, that the lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose, and shall be disposed of

only as the work progresses; provided further that the grant of lands hereby made shall be on condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding \$2.50 per acre''.

On or about the 22nd day of October, 1870, the legislature of the State of Oregon passed an Act pursuant to, and in compliance with said original Granting Act, granting all of said lands to the Coos Bay Wagon Road Company, a corporation.

That thereafter, and on or about the 18th day of June, 1874, Congress passed an Act authorizing the issuance of *restricted* patents for said lands granted by said Act, and said Act of Congress limited the effect to be given to said patents in the following language:

“provided, that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled”.

The Coos Bay Wagon Road Company was duly incorporated prior to October 22, 1870, under the laws of the State of Oregon, but the corporate powers of said corporation were limited, and said corporation was formed solely to construct, and keep open for travel, a wagon road from Coos Bay, in Coos County, Oregon, to Douglas County, Oregon, and was not organized for the purpose of, or with the intention of holding any real estate whatsoever, except the wagon road itself.

Pursuant to the Act of June 18, 1874, four patents were issued to said Coos Bay Wagon Road Company, but each patent referred directly and specifically to said original Granting Act.

Subsequently, the Coos Bay Wagon Road Company sold said wagon road to the extent of a width of fifty (50) feet on each side of the center of said road to one John Miller, alias Ambrose Woodroof.

Thereafter said Coos Bay Wagon Road Company sold 35,533.49/100 acres of said grant, for the sum of \$35,534.00, to said John Miller, alias Ambrose Woodroof, contrary to the express conditions of said grant, and said John Miller, alias Ambrose Woodroof, immediately conveyed the same by deed to Collis P. Huntington, Leland Stanford, Mark Hopkins, and Charles Crocker.

This portion of the grant was subsequently conveyed by Huntington, Crocker, Hopkins, and Stanford, to others; and by these grantees, through other mense conveyances, to the Oregon Southern Improvement Company.

On or about the 7th day of January, 1884, the Coos Bay Wagon Road Company, in consideration of the sum of \$91,715.05, conveyed to one William H. Besse, 61,143.37 acres of said grant in violation of said Granting Acts. That thereafter the Coos Bay Wagon Road Company was dissolved and is not now in existence for any purpose whatsoever.

Upon obtaining title to these lands the Oregon Southern Improvement Company executed a blanket

mortgage upon the same, and all property of said corporation, and caused bonds to be issued thereunder, and the stocks and bonds of said corporation to be sold extensively in Boston, and elsewhere, and thereafter purposely defaulted in the payment of the interest on said bonds, and collusively caused said mortgage to be foreclosed by William J. Rotch and Edward D. Mandrell, and, through the medium of Elijah Smith, Prosper W. Smith, William H. Besse, Russell Gray, William J. Rotch, William W. Crapo, and Edward D. Mandrell, the Southern Oregon Company, was organized, pursuant to said conspiracy, and it purchased all of said lands now under investigation, as set forth in the complaint, with full and complete notice and knowledge of its predecessors' fraud, and participated therein.

The contentions of plaintiffs in this case are as follows:

I.

They each have a right to purchase 160 acres of this land for the sum of \$2.50 per acre under the terms and conditions of the grant, and the trust thereby created.

II.

That the Southern Oregon Company has in each instance failed, neglected, and refused, and still does refuse to make, execute, and deliver a conveyance of said lands to said complainants pursuant to the terms of said trust and grant.

III.

That said refusal is in direct contravention of the express terms of said Granting Acts, and the trust created by said Acts.

IV.

That by virtue of said grant, an express trust for the benefit of third parties is created, and the State of Oregon, and the Southern Oregon Company, are bound and held by the terms of said trust or contract.

V.

That the Southern Oregon Company, and the State of Oregon, are estopped to deny the binding effect of said trust, and have both knowingly accepted all of the terms and conditions under which said grant was made. That said condition is a "clinging condition" to said lands, no matter in whose hands the title is found, even in remote alienees. It is a condition "running with the land".

VI.

The effect of this grant was to create *a power coupled with a trust* or "an estate upon condition" in the hands of *qualified* owners. Of course, it will be readily understood that, as far as the State of Oregon was concerned, it was a trustee, and it was its duty under said Act, by virtue of its "power", to transfer the land to some one who would in good faith, construct the wagon road, and *dispose of the lands according to the terms of the grant.*

VII.

All of said transfers from the Coos Bay Wagon Road Company to others were absolutely void and carried no title, and, by the death of the Coos Bay Wagon Road Company, the title to all lands unlawfully sold, reverted to and are in the State of Oregon.

VIII.

The Southern Oregon Company are trustees *ex-malificio* of these lands and took them with full and complete notice of the fraud and in contravention to the statutes, which were public Acts.

IX.

The United States has never repealed the Granting Act of March 3, 1869; neither has it revoked the trust reposed in the State of Oregon by virtue of said Act of Congress. (*U. S. v. Southern Oregon Co.*, 196 Fed. 423, 426.)

 POINTS AND AUTHORITIES.

I.

PARTIES PLAINTIFF AND DEFENDANT.

JOINDER.

Joinder of parties plaintiff does not seem to be founded on any positive and uniform principles; and, therefore, it does not admit of being expounded by the application of any universal theorem as a test.

For the purpose of enforcing rights in trust property plaintiffs with identical interests may be joined.

Story's Eq. Pl., Sec. 76c, 280;

Murray v. Hay, 1 Barb. Ch. (N. Y.) 59; 43 Am. Dec. 773;

Cumberland v. R. Co., Appeal 62 Pa. St. 218, 227, 228;

Lord's Or. Laws, Vol. I, Sec. 393;

Hough v. Porter, 51 Or. 318; 95 Pac. 732;

Basshor Co. v. Carrington, 104 Md. 606; 65 Atl. 360, 364;

McGuire v. Devlin, 158 Mass. 63; 32 N. E. 1028;

Allen v. Simons, 1 Fed. Cases, No. 237;

Watson v. National Life etc. Co., 162 Fed. 7; 88 C. C. A. 380;

Bunnel v. Stoddard, 4 Fed. Cases, No. 2135, pg. 682.

A bill in equity for relief against the failure to execute, or the abuse of a private trust, vested in several co-trustees, may be properly brought against them all, although the neglect or other wrong is chargeable to only one of them.

Lord's Oregon Laws, Vol. I, Sec. 393;

Equity Rule 37;

Smith v. Wildman, 37 Conn. 387;

39 Cyc., 608; note 76, and cases cited;

22 Cyc. of P. and Practice, pg. 124, note 5;

Rodgers v. Penobscot Min. Co., 154 Fed. 606; 83 C. C. A. 380.

The bill must contain averments showing that the defendants have or claim such an interest in the

property involved as to justify their joinder as defendants. This we do show: it is alleged that the State of Oregon is a trustee of these lands and has an estate therein.

Bank of U. S. v. Planters Bank of Ga., 22 U. S. 904, 909;

Lord's Or. Laws, Sec. 394;

Brun et al. v. Mann, 151 Fed. 145; 80 C. C. A. 513; 12 L. R. A. (U. S.) 154.

Caylor v. Cooper, 165 Fed. 757, 762;

Hough v. Porter, 51 Or. 318; 95 Pac. 732;

Rodgers v. Penobscot Min. Co., 154 Fed. 606; 83 C. C. A. 380.

II.

THIS TRUST MAY BE ENFORCED BY PLAINTIFFS.

If any trust was created it is for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust.

Lord's Oregon Laws, Vol. I, Sec. 389;

Cowell v. Springs Co., 100 U. S. 55, 58;

Russell v. Clark, 7 Cranch 69, 70; 3 L. Ed. 271;

Perry on Trusts, Sec. 334 (6th Ed.);

39 Cyc., 448, 522; note 28.

A trustee may be compelled to convey his legal title at the suit of one not at the time entitled to the

beneficial estate, provided the legal title when so conveyed will inure to the present beneficial owner.

Widdicombe v. Childers, 84 Mo. 382, affirmed 124 U. S. 400, 404, 405; 8 Sup. Ct. 517; 31 L. Ed. 427;

Russell v. Clark, 7 Cranch 69, 70; 3 L. Ed. 271.

III.

THE ORIGINAL GRANT WAS A TRUST.

The original grant carried title to the State of Oregon, in trust, to be defeated only by the actions of the trustee. The State of Oregon held these lands just as any other trustee would have held them. It took them not as a sovereign in its sovereign governmental capacity, but as a municipal corporation dealing with property interests, and as a trustee, to execute the trust reposed in it by the grant.

Colton v. Colton, 127 U. S. 300, 310;

2 *Wash. Real Prop.* (6 Ed.), Sec. 1412;

Schulenberg v. Harriman, 21 Wall. 44;

Farnsworth v. Minn. & Pac. Railroad, 92 U. S. 49, 65;

Rice v. Railroad Co., 1 Black 358;

McCarver v. Herzberg, 120 Ala. 523; 25 So. 3;

Galloway v. Doe Ex. dim. Henderson, 136 Ala. 315; 34 So. 957;

Johnson v. Balou, 28 Mich. 378, 382;

Marriner v. Oconto Land Co., 146 Wis. 531; 126 N. W. 34;

Sioux City etc. R. Co. v. U. S., 159 U. S. 349,
364; 40 L. Ed. 177;

2 *Wash. Real Prop.* (6 Ed.), Sec. 1471;

Holmes v. Walter, 118 Wis. 409; 95 N. W. 380;
62 L. R. A. 986, 989.

Not intending to unjustly criticize any decisions heretofore rendered by the District Court of the State of Oregon, in connection with this grant, or the grant to the Oregon and California Railroad Company, we wish to say:

“No court can sanction the violation of a trust, but will always act on the presumption that it will be faithfully executed. And this is especially the case when the trust is vested in the State, which is not amenable to judicial process.”

Paup. et al. v. Drew, 51 U. S. 217, 222 (10 How. 222).

IV.

FEDERAL QUESTION.

Whether

“a suit is one that arises under the constitution or laws of the United States, is determined by the question involved. If, from them, it appears that some title, right or privilege, or estate on which the recovery depends will be defeated by one construction of the Constitution, or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States,”

and the construction of this law must be directly involved.

Doolan v. Carr, 125 U. S. 618, 620;

Huff v. Union National Bank, 173 Fed. 333, 336;

Cooke v. Avery, 147 U. S. 375;

Starin v. City of New York, 115 U. S. 248, 257;

Spokane Falls v. Zeigler, 167 U. S. 65, 72.

V.

Trusts are classified as legal and illegal. They are illegal when they are for purposes of immorality, or vice, or of defrauding creditors, or contravene some statute, or are contrary to public policy. The trust *ex-malificio* which now exists in the Southern Oregon Company, is one that contravenes a statute, to wit: The *Granting Act*, and further, the trust which exists in the Southern Oregon Company of the lands involved in this suit, is contrary to public policy, for it is a fraud of the rankest and most vicious kind.

1 *Perry on Trusts* (6 Ed.), Sec. 21;

1 *Lewin on Trusts*, 19.

Referring to trusts contravening some statute, or which are contrary to public policy, Mr. Lewin says:

“The latter are trusts created for the attainment of some end contravening the policy of the law, and therefore not to be sanctioned in a forum professing not only justice, but equity, as a trust to defraud creditors, *or to defeat a statute.*” (The italics are ours.)

A trust *ex-malificio* is:

“A species of constructive trust arising out of some fraud, misconduct, or breach of faith on the part of the person charged as trustee, which renders it an equitable necessity that a trust should be implied.”

“Trusts *ex-malificio* differ from other trusts, in that they are not within the intention, or contemplation of the parties at the time the contract is made.”

Kent v. Dean, 128 Ala. 600, 609; 30 So. 543;

Pomeroy's Eq. Jur., Secs. 155, 1053;

Davis v. Hamlin, 108 Ill. 40, 49;

Moore v. Crawford, 130 U. S. 122, 128; 32 L. Ed. 878;

Monroe Cattle Co. v. Becker, 147 U. S. 47, 57;

Angle v. Chicago etc. R. Co., 151 U. S. 1, 26;

11 *Ency. U. S. Sup. Ct. Rep.*, pg. 692.

VI.

TRANSFERS IN VIOLATION OF STATUTE CONVEYS NO TITLE.

A sale of lands in larger quantities than provided for in a public grant is void and no title passes:

Jackson et al. v. Davidson, 65 Mich. 416;

L. R. Ft. Smith R. Co. v. Howell, 31 Ark. 120;

Swan v. Miller, 1 So. 68;

Sullivan v. Van Kirk L. & C. Co., 26 So. 925;

Schulenburg v. Harriman, 21 Wall. 44; 22 L. Ed. 551;

Taylor v. Brown, 5 Dak. 335; 40 N. W. 525;

Smythe v. Henry, 41 Fed. 705.

Where a trust is expressly created by a written instrument, every sale in breach or contravention of the trust is declared to be absolutely void even if the same is under sanction of the court.

Foxcroft v. Mallett, 45 U. S. 353; 4 How. 353, 376; 11 L. Ed. 1008;

Lewis v. Taylor, 96 Ky. 556; 29 S. W. 444.

In *Swan v. Miller*, 1 So. 68, it is said:

“It can scarcely be contended that a sale made in contravention of the letter and policy of a law is merely voidable. It cannot be other than void *ab initio*.” “No sale made in violation of law can be said to be *bona fide*, nor are the claims of a *mala fide* purchaser intended to be protected by the statutes. The contracts of sale, being void for illegality, were incapable of ratification. Only that which is voidable can be ratified in any proper sense of the word, not that which is absolutely void”.

VII.

EQUITY HAS POWER TO ENFORCE THE CONDITIONS OF THIS GRANT.

A court of equity has plenary jurisdiction of a bill to establish and enforce a trust, and where jurisdiction is obtained to aid in the execution of a trust, it may retain the bill and afford full relief.

French v. Westgate, 70 N. H. 229; 47 Atl. 93;

Johnson v. Towsley, 13 Wall. 72; 20 L. Ed. 485;

Hall v. Dunn, 52 Or. 479; 97 Pac. 811;

McKee v. Lannon, 159 U. S. 317;

10 *Ency. of U. S. Sup. Ct. Rep.*, pg. 260, 261.

VIII.

TRUSTEES WITH NOTICE—THEIR SUCCESSORS.

Persons acquiring trust property belonging to an active continuing trust, with notice of such trust, are considered trustees and may be compelled to execute the trust.

Lockhart v. Leeds, 195 U. S. 427, 436; 49 L. Ed. 263;

1 *Story's Eq. Jur.*, Sec. 533, 1061;

French v. Westgate, 70 N. H. 229; 47 Atl. 93.

It is alleged (*and it is true*) that the Oregon Southern Improvement Company mortgaged the property involved to the Boston Trust Company and that the mortgage was foreclosed and the property acquired by the Southern Oregon Company with full notice of lack of title and that such act was in contravention of a public law. This gave no greater title than was originally possessed by the grantees of the Coos Bay Wagon Road Company.

Lewis v. Taylor, 96 Ky. 556; 29 S. W. 444, 445;

Bragg v. Hartney, 92 Ark. 55; 121 S. W. 1059;

Dow v. Berry, 18 Fed. 121;

39 *Cyc.*, 548, 549, 562;

Story's Eq. Jur., Sec. 1903.

A person for whose benefit a trust is created may, in equity, compel its performance, although he is not

a party to the contract which created it, and had no knowledge thereof at the time of its creation.

Felix v. Patrick, 145 U. S. 317, 328; 36 L. Ed. 719.

Bank of Met. v. Guttschlick, 14 Pet. 19, 30, 31;
10 L. Ed. 335;

39 Cyc., 79;

1 *Perry on Trusts*, Sec. 223 (6th Ed.).

2 *Perry on Trusts*, Secs. 828, 835 (6th Ed.).

Union Pac. R. Co. v. Durant, 95 U. S. 576; 24
L. Ed. 391.

IX

CONSTRUCTIVE TRUSTS ARE MOULDED TO FIT THE INSTANT CASE BY EQUITY.

Trusts which arise, in view of a court of equity, in favor of persons equitably entitled to property—wrongfully obtained or withheld by another (the Southern Oregon Company), are not trusts at all, in the proper sense of the word, as no relation of confidence exists, and the person equitably entitled seeks, not to secure an equitable estate, but merely to enforce an equitable right. Since, however, courts of equity in such a case frequently apply the same remedy as in the case of a fraudulent breach of trust by a trustee, the custom has become almost universal, of assuming and implying the existence of a trust, for the purpose of giving relief to the person defrauded, a trust so implied being generally known as a constructive trust, it is remedial rather than substantive.

Lockhart v. Leeds, 195 U. S. 427;

Lord's Laws of Oregon, Vol. I, Secs. 516, 389;

Cattle Co. v. Becker, 147 U. S. 47, 57; 13 Sup. Ct. 217;

39 *Cyc.*, 548, 549, 550, 169, 170;

3 *Pom. Eq. Jur.* (3rd Ed.), Secs. 1044, 1053.

X.

CONSTRUCTION OF THE GRANTING ACT.

The first principle of statutory construction is, that the intent of the legislature must be ascertained and enforced. This is not a rule of statutory construction, it is the object of statutory construction. Although an elementary principle, it is frequently referred to by the courts when efforts are made to induce a perversion of the meaning of a statute under the guise of statutory construction.

Winona etc. v. Barney et al., 113 U. S. 618, 625;
Lewis Sutherland Stat. Con., Vol. II, pp. 693
 et seq.;

Schulenberg v. Harriman, 21 Wall. 44;

United States v. Southern Pacific, 146 U. S. 570,
 599.

Closely allied to the rule last stated is the familiar rule, that in the construction of a statute, effect must be given, not only to the entire statute, but to all of its parts. The legislature is presumed not to have inserted any provision or clause which it did not intend should be enforced.

That construction is favored which gives effect to every clause, and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect.

It is next in order to ascertain the general method by which statutory enactments are construed and apply it in the case at bar. *The language employed controls unless the natural and ordinary meaning thereof leads to consequence so absurd or irrational as to create a doubt that Congress so intended.*

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language employed. If the language employed is plain and unambiguous, and the natural and ordinary meaning thereof involves no consequences so absurd or irrational as to raise a doubt that the legislature so intended, it is conclusive, and the work of construction is at an end. It is a maxim of all rules of statutory construction that when a plain and unambiguous meaning has been reached, which does not upon its face suggest that it could not have been intended by the legislature, the process of construction is completed. Rules of statutory construction are to be employed to resolve, but never to create, doubts.

United States v. Goldenberg, 168 U. S. 95, 102;
Hamiltone v. Rathbone, 175 U. S. 414, 419;
Lewis' Sutherland Statutory Construction, Vol. 2, pp. 698-702, and cases cited.

XI.

THE SOUTHERN OREGON COMPANY, AND ITS PREDECESSORS
IN INTEREST WERE NOT BONA FIDE PURCHASERS.

Where, upon the face of the title papers, the purchaser from a trustee has full means of acquiring complete knowledge of the title from the references therein made, and to the origin and consideration thereof, he will be deemed to have constructive notice thereof.

Gaines v. Summers, 50 Ark. 322; 7 S. W. 201;
Oliver v. Piatt, 3 How. 333; 11 L. Ed. 622;
 39 Cyc., 562, 563, 565, 566.

Under all the facts alleged in the complaint, the defendant, Southern Oregon Company, is not a *bona fide* purchaser or holder of the lands involved. No party, with notice, receiving a deed from a party holding lands in trust, in violation of the terms of such trust, can be a *bona fide* holder of such lands.

2 Wash. Real Prop. (6 Ed.), Secs. 1435, 1483;
 note 5;
Black Com., Book II, 337;
Wormley v. Wormley, 8 Wheat. 421; 5 L. Ed.
 651;
U. Pac. R. Co. v. McAlpine, 129 U. S. 305, 314.

XII.

ESTOPPEL.

The grantees are estopped to deny the effect of said grantor's contract for the benefit of third parties or terms of this trust.

2 Wash. Real Prop. (6 Ed.), Sec. 1471;
Little Rock & Ft. Smith R. R. v. Howell, 31 Ark.
 119, 127;

Maynard v. Maynard, 4 Ed. Ch. 711;
Taylor v. Fla. E. C. Ry. Co., 54 Fla. 636; 45 So.
 574; 127 Am. St. Rep. 155, 165;
2 Devlin on Deeds, (3rd Ed.) Sec. 940a;
Hickey v. Ry. Co., 51 Ohio St. 40; 36 N. E. 672;
 23 L. R. A. 396; 46 Am. St. Rep. 545;
Peters v. Bain, 133 U. S. 695;
Atl. Dock Co. v. Leavitt, 54 N. Y. 35, 38.

XIII.

EFFECT OF PROVISIO FOR SALE OF LANDS.

This is a “clinging condition” to the estate no matter in whom the title is found, and even in remote alienees, it is a condition “running with the land.”

2 Wash. Real Prop. (6 Ed.), Sec. 1481;
Dembitz on Land Titles, pg. 160, note 165;
Shepard's Touchstone, Ch. 6, 176, 161;
1 Coke on Lit., pg. 230b; also pg. 47a;
Foxcroft v. Mallet, 45 U. S. 353; 4 How. 353,
 376; 11 L. Ed. 1008;
Carver v. Jackson etc., 4 Peters 84, et seq.

XIV.

EFFECT OF THE PATENTS.

On the 18th day of June, 1874, an Act authorizing patents to issue for these lands was approved by the President of the United States, which became a public law and was supplementary to the original Granting Act.

This Act contained the following proviso:

“PROVIDED, that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.”

As said by Brewer, J., in *Shaw v. Kellogg*, 170 U. S. 312, “there is no magic in the word patent”. The patent to any portion of this wagon road land grant operates in three ways:

1. It is a conveyance by the Government—if the Government has any interest to convey that has not already been granted.

2. It is issued in confirmation of the claim of a previously existing title—to the extent of that title—no further. The patent is as broad as the grant, and not broader; it is as narrow as the grant, and not narrower; it adds nothing to, nor subtracts nothing from, the interest vested by the grant of 1869.

3. It is documentary evidence, having the dignity of a record of the existence of that title; or of such equities respecting the holder’s claim as justifies its recognition. It is to its possessor an instrument of quiet and security to the extent of the estate conveyed; it does not add anything to the estate vested by the original grant; if it did it would be inoperative to that extent.

Langdeau v. Hanes, 21 Wall. 521, 529; 22 L. Ed. 606;

Wright v. Roseberry, 121 U. S. 488, 497, 499; 30 L. Ed. 1039;

Whitney v. Morrow, 112 U. S. 693, 695; 28 L. Ed. 871;

Morrow v. Whitney, 95 U. S. 551; 24 L. Ed. 456.

XV.

LIMITATIONS AND LACHES.

As between the trustee and *cestui que trust* in case of an express trust, the statute of limitations has no application and no length of time is a bar, because the law will not permit the trustee to begin to hold adversely until he shall have restored the property to the true owner, and given notice of his own interest.

Manandas v. Mann, 22 Or. 531; 30 Pac. 422;

Foxcroft v. Mallet, 45 U. S. 353; 11 L. Ed. 1008;

Marriner v. Oconto Land Co., 142 Wis. 531; 126 N. W. 34;

New Orleans v. Warner, 175 U. S. 120, 130; 20 Sup. Ct. 44;

25 Cyc., 1149, 1150, and cases cited;

Canada v. Daniel (Mo.), 157 S. W. 1032;

Elliott v. Machine Co., 236 Mo. 546; 139 S. W. 356;

Case v. Goodman, 250 Mo. 112; 156 S. W. 698.

XVI.

ADVERSE POSSESSION.—COLOR OF TITLE.

The Southern Oregon Company pretends to hold title to the lands involved in fee simple. To do this its position must be adverse to the whole world. This

it can not do, for its title rests upon the original grant. The patents issued to the Wagon Road Company conveyed no title whatsoever, and their effect was *purposely restricted* by Congress to guard against the very fraud exposed in this particular case.

Altschal v. O'Neill, 35 Or. 202, 221; 58 Pac. 95;
Ward v. Cochran, 150 U. S. 597, 608; 14 Sup. Ct. 230; 37 L. Ed. 1195.

All deeds upon which defendant, Southern Oregon Company, bases its title were executed fraudulently and in violation of express statutory provisions, and were accepted by said defendant and its predecessors in interest, with full knowledge of the Granting Act, and such deeds do not give color of title.

Taylor v. Brown, 5 Dak. 335; 40 N. W. 525;
Smythe v. Henry, 41 Fed. 705, 709;

Argument.

An extended argument is uncalled for in this case, for the land grant situation on this coast has been thoroughly exposed during the last seven years, by the government and private parties.

As far as the State of Oregon is concerned, in connection with this grant, it cannot be disputed that the State was made a trustee of these lands (*Colton v. Colton*, 127 U. S. 300-310) by the United States.

This court must concede that the trust passed from the State of Oregon to the Coos Bay Wagon Road

Company. The court must further admit that the Coos Bay Wagon Road Company, in violation of this trust, attempted to sell the wagon road bed to John Miller, alias Ambrose Woodroof; likewise two large tracts of the granted land, one to Miller, alias Woodroof, and the other to William H. Besse.

These transfers were absolutely contrary to a public law, and in defiance of a public statute, and these transfers cannot be maintained, or upheld, by this court, or any other court; such transfers *carried no title of any kind or character.*

This court must concede that all instruments executed by the Wagon Road Company carried notices of the grant, and trust, upon the face of such conveyances; and to more clearly indicate to the court the knowledge of wrong on the part of the Coos Bay Wagon Road Company, in these transfers, we here insert a copy of a certain deed (illustrative of many others) from the Wagon Road Company to Charles F. Wheeler, executed in 1873, wherein it recognizes the binding force and effect of the grant to it, and its duties under its provisions.

To more clearly indicate the change of position in the control of the Coos Bay Wagon Road affairs we also insert (omitting description of land) deeds from the Wagon Road Company to Miller and Besse.

These deeds are inconsistent, one is honest and carries out the will of Congress, while the others are nothing more nor less than a deliberate and flagrant *breach of a public law*, and are the strongest argu-

ment that can be made as to the dishonest motive of the Wagon Road Company, in attempting to defraud the public of its rights in these lands, and to put the title beyond the reach of the law.

The Wheeler deed is as follows:

“Office of Coos Bay Wagon Road Company, Roseburg, Oregon, March 10th, 1873, at a meeting of the Board of Directors of the Coos Bay Wagon Road Company, held at the office of the Company, at Roseburg, on the 10th of March, A. D. 1873, at which were present Aaron Rose, President; A. R. Flint, T. J. Beale, S. Hamilton and J. M. Eberlien, Directors, and J. F. Watson, Secretary, among other proceedings the following resolution was adopted:

Resolved, That the President and Secretary be and they are hereby authorized and empowered in the name and on behalf of the Company to make, execute, seal, with the corporate seal of the Company, and deliver to the parties entitled thereto, deeds in fee simple in all cases in which they have contracted to sell, any lands forming part of its land grant.

I, J. F. Watson, Secretary of Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the records of Coos Bay Wagon Road Company in my possession as Secretary.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Company, the 30th day of June, A. D. 1873.

(Seal)

J. F. WATSON, Secretary.

KNOW ALL MEN BY THESE PRESENTS, That the Coos Bay Wagon Road Company, a private Corporation, duly incorporated under the laws of Oregon, represented herein by S. Hamilton, its President, and J. F. Watson, its Secretary; for and in consideration of the sum of Four Hundred (400)

Dollars, gold coin of the United States, to it paid by Charles F. Wheeler, of Coos County, in the State of Oregon, at or about the ensealing of these presents, the receipt of which is hereby acknowledged, has bargained, sold and conveyed and by these presents does bargain, sell and convey unto the said Charles F. Wheeler, his heirs and assigns forever, all of the following described tract or parcel of land situated in Coos County, Oregon; being a part of the lands granted by the Act of Congress, approved March 3, 1869, to the State of Oregon, to aid in the construction of a Military Wagon Road from the Navigable waters of Coos Bay to Roseburg, and granted by the Act of the Legislative Assembly of the State of Oregon, approved October 26th, 1870, to the Coos Bay Wagon Road Company, to wit: The East Half of the North East Quarter, and the North East Quarter of the South West Quarter and the South West Quarter of the South West Quarter of Section Thirty Five (35) in Township Twenty Six (26) South of Range Thirteen (13) West of Willamette Meridian, containing one hundred and sixty (160) acres.

TO HAVE AND TO HOLD, The premises above described, together with all appurtenances thereunto, in any way appertaining or belonging, unto the said Charles F. Wheeler, his heirs and assigns forever.

IN WITNESS WHEREOF, The President and Secretary of Coos Bay Wagon Road Company have hereunto set their hands and affixed the Corporate Seal of said Company, this Thirtieth (30th) day of June, A. D. 1873.

(Seal) COOS BAY WAGON ROAD COMPANY,
By S. Hamilton, President,
J. F. Watson, Secretary.

In Presence of:

L. F. Lane,
C. A. Fergerson."

In contradistinction to the Wheeler deed we exhibit copies of deeds (omitting descriptive parts), to Miller and Besse, of lands, and wagon road bed, in this argument, again emphatically calling the court's attention to the Act of June 18, 1874, authorizing patents to issue, and specifically pointing out the following proviso contained in said Act:

“Provided, that this shall not be construed to revive any Land Grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled.” (Langdeau v. Hanes, 21 Wall. 521-529; 22 L. Ed. 606.)

“COOS BAY WAGON ROAD COMPANY,

TO

JOHN MILLER.

KNOW ALL MEN BY THESE PRESENTS: That the Coos Bay Wagon Road Company, a corporation duly organized under the laws of the State of Oregon, and represented herein by S. Hamilton, its President, and J. F. Watson, its Secretary, being thereunto duly authorized by virtue of a resolution of the Stockholders of said corporation, and by a resolution of the Trustees of said corporation, copies of which resolutions are attached hereto and hereby made a part of this deed, for and in consideration of the sum of Thirty-five thousand five hundred and thirty-four and 00/100 dollars in Gold Coin of the United States, to it in hand paid by John Miller, of the City and County of San Francisco in the State of California, at or about the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said John Miller, his heirs and assigns forever, all of the following described tracts or parcels of land, situated in Douglas

County in the State of Oregon, and in Coos County in said State, being all of the lands granted by the Act of Congress approved March 3, 1869, entitled 'An Act Granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg in said State, and granted by the Act of the Legislative Assembly of the State of Oregon, approved October 26th, 1870, to the Coos Bay Wagon Road Company. Embraced and described in Patent No. 1 issued by the Government of the United States to the Coos Bay Wagon Road Company, bearing date February 12th, A. D. 1875. Except such tracts as have been already sold and disposed of by said Company (a list of which tracts have been delivered to said John Miller). The lands granted, bargained, sold and conveyed hereby are described as follows, to wit:

* * *

All of said tracts, containing in the aggregate Thirty-five thousand five hundred thirty-three and 59/100 acres, together with all appurtenances thereunto belonging or in any wise appertaining.

To HAVE AND TO HOLD all of the said tracts above described with all appurtenances thereunto in any way appertaining or belonging unto the said John Miller, his heirs and assigns forever.

IN WITNESS WHEREOF, the said Coos Bay Wagon Road Company has caused its Corporate Seal to be hereunto affixed and its corporate name to be hereunto subscribed by its President and its Secretary thereto, duly authorized by resolution as aforesaid this 31st day of May, A. D. Eighteen Hundred and Seventy-five.

COOS BAY WAGON ROAD COMPANY,
By S. Hamilton, President,
and
J. F. Watson, Secretary.

Signed, sealed and delivered in presence of:

As to S. Hamilton's Signature:

John H. Cammet,

A. T. Green.

As to Signature of J. F. Watson:

L. F. Lane,

J. B. Noble."

<p>"COOS BAY WAGON ROAD COMPANY,</p> <p style="text-align: center;">TO</p> <p>JOHN MILLER.</p>	}	DEED OF WAGON ROAD.
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KNOW ALL MEN BY THESE PRESENTS: That the Coos Bay Wagon Road Company, a corporation duly incorporated under the laws of the State of Oregon, represented herein by S. Hamilton, its President, and J. F. Watson, its Secretary, and being thereunto duly authorized by virtue of the resolution of the Stockholders, and of a resolution of the Trustees of said corporation, copies of which are hereunto attached and made a part of this deed, for and in consideration of the sum of Thirty-seven thousand and two hundred (\$37,200) dollars in United States Gold Coin, to it paid by John Miller of the City and County of San Francisco, State of California, at or about the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, Has Granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said John Miller, his heirs and assigns forever, all of that certain Military Wagon Road situated in Douglas County and in Coos County, in the State of Oregon, and running from the navigable waters of Coos Bay to Roseburg in said State, and all of the land over and upon which the said road passes and is situated, to the width of fifty (50) feet on each side of the center of said road, and

also all of the land, toll houses, toll gates, buildings, tools, wagons, carts, implements and property connected and used in, upon and about said road, also all franchises, rights, privileges and property appertaining to said road held and which may be held and which might be held and exercised by said corporation as freely and to the same extent as if the said road remained the property of said corporation.

But all of the land granted to said corporation by the United States and the State of Oregon shall not be affected by this deed except so far as the same is used for the purposes of running and operating said road.

TO HAVE AND TO HOLD all of said road as above described with all of said appurtenances thereunto belonging or in any wise appertaining unto the said John Miller, his heirs and assigns forever.

IN WITNESS WHEREOF, the said Coos Bay Wagon Road Company has caused its corporate seal to be hereunto affixed and its corporate name to be hereunto subscribed by its President and Secretary thereunto duly authorized by resolution as aforesaid this 31st day of May, A. D. One thousand eight hundred and seventy-five.

(Seal) COOS BAY WAGON ROAD COMPANY,
By S. Hamilton, President,
J. F. Watson, Secretary.

Signed, sealed and delivered in presence of:

As to signature of S. Hamilton:

John H. Cammet,
A. P. Green."

The sale of the wagon road meant one of two things: *First*, that the Wagon Road Company intended to pass the trust along, or: *Second*, to break a public law. Either motive makes no difference to this court, for the transfers *were void and carried no title*.

“COOS BAY WAGON ROAD COMPANY

TO

WILLIAM H. BESSE.

THIS INDENTURE, made the seventh day of January, one thousand eight hundred and eighty-four between the Coos Bay Wagon Road Company, a corporation duly formed and existing under the laws of the State of Oregon, whose office and principal place of business is at the town of Roseburg, County of Douglas, State of Oregon, represented herein by its president, S. Hamilton, thereunto duly authorized by a resolution of the Stockholders passed at a meeting held on the fifth day of January, A. D. 1884, and a resolution of the Board of Directors of said Company passed at a meeting held on the fifth day of January, A. D. 1884, copies of both of which resolutions are hereto attached and made part of this deed, party of the first part, and William H. Besse, of the City of New Bedford, State of Massachusetts, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Ninety-one thousand seven hundred and fifteen and five one hundredth (\$91,715.05) dollars, Gold Coin of the United States of America, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part and to his assigns forever, all of the following described tracts or parcels of land situate, lying and being in the Counties of Douglas and Coos in the State of Oregon, being a portion of the lands donated to the State of Oregon by the Act of Congress approved March 3rd, 1869, entitled ‘An Act Granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from the navigable waters

of Coos Bay in said State', and granted by the Act of the Legislative Assembly of the State of Oregon, approved October 26th, 1870, to the Coos Bay Wagon Road Company.

Being in all Sixty-one thousand one hundred and forty-three and 37/100 (61,143-37/100) acres more or less. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in or to the above described premises and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the party of the first part hereby covenants to and with the party of the second part, his heirs and assigns, that said party of the first part is the owner in fee simple of said above described premises and that they are free from all incumbrances and that said party of the first part will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said party of the first part hath caused these presents to be signed by its President and the official seal of the Corporation to be affixed, the day and year first above written.

THE COOS BAY WAGON ROAD COMPANY,
By S. Hamilton, President.

In presence of
S. F. Chadwick
E. B. Clement

Attest
J. F. Watson. (Seal) Secretary."

Again we find the defendant, Southern Oregon Company, indirectly admitting that it has no estate in these

lands by the act of filing a petition to avoid payment of taxes for the years 1909 and 1910. (*U. S. v. Southern Oregon Co.*, 196 Fed. 423.) True, the petition does not directly admit that it is without title—but *why did it file the petition?* The answer suggests itself; it had no title and did not want to pay taxes on property it did not own.

In the case of *U. S. v. O. & C. R. R. Co.*, now on appeal in this court, certain views are held by the learned judge, who rendered that opinion, that do not accord with the honest belief of the author of this argument. Inasmuch as we are opposed to the principles laid down in that case, and that, in a way, it clashes with our conception of what is right, we maintain, with all due respect to the great ability of the author of that opinion, that it is absolutely wrong, thoroughly unjust, not practical in its application, inconsistent with property rights, fallacious in its foundation, and economically unsound.

In the first place the railroad company earned its granted lands by the construction of a railroad, according to the terms of the grant, and its contract with the government. All conditions were complied with by the railroad company, and, between man and man, government and citizen, the railroad company has an honest vested right in the grant of lands so received from the government.

The law governing the administration of railroad and wagon road grants *is to be found in the Granting Act, and not elsewhere*; it therefore follows, that no court has a right to go outside of the Granting Act to correctly interpret it. *For the Granting Act contains, and is the sole evidence of the will of Congress.*

The railroad grant contained a clause to the effect that the lands should be sold to "actual settlers" in quantities not exceeding one hundred and sixty acres, and for not more than two dollars and a half per acre. The railroad company failed, neglected, and refused to dispose of these lands according to the terms of the grant, and the only question before the court was this; could they be compelled to comply with that particular proviso.

Plainly stated, forfeiture is repugnant to a court of equity. This is elementary and no authorities are needed to support this statement of law. Again, vested rights cannot be struck down in this country by the imperialistic decree of any court. For such rights are protected by the constitution and must be respected by all, no matter what their position may be. If vested rights are not recognized and upheld by the courts, then we have liberty uncontrolled by law, *and we are a mob*. The basic foundation of this government is simply this: that we are possessed of certain inalienable rights governed and regulated by law, making a harmonious whole, systematic and perfect in all of its parts.

The remedy in the railroad case is easy and abides within the law; for, if the railroad was insubordinate and continued in its insubordination, the court had power to appoint officials to distribute the grant, according to the terms of the Granting Act, without striking down vested rights. The same principles of justice apply, to a limited extent, to the present case, and we insist and submit that the case of the *United States v. O. & C. R. R. Co.*, now on appeal to this court, is not sound, nor an authority, in this or any other case.

Distinguishing that case from the one at bar, we maintain and insist that the two cases are not parallel. In the instant case, each and every transaction is nothing more nor less than an open and palpable fraud; while no fraud can be charged to the railroad company. In the railroad company's case, it is simply a matter of a *difference of opinion*. The railroad company either will not, or cannot, distinguish between an "actual settler" and an "actual applicant"; as a natural consequence, the railroad company cannot properly decide, *in all cases*, as to who is entitled to acquire lands from it. Both "actual settler" and "actual applicant" are equally vociferous and vehement in forcing their respective claims upon the railroad company, and stoutly, if not boisterously, maintain *their opinion* that they should have certain lands. While the railroad company, just as obstinately and pertinaciously, maintain that it is absolutely, and beyond question, entitled to its *own opinion* concerning its *own* property, and its *own* policies in the management of its *own* affairs.

In other words uncertain and unknown human elements entirely disconnected with the management of the railroad company, and antagonistic to it, would direct its affairs, control its future, and dictate orders to its "office help", landing it, and its bondholders, in financial regions beyond the knowledge of this court or any other earthly intelligence. It is respectfully submitted that if these ideas were carried out, it would mean confusion between the comprehension of true deductions, and the comprehensiveness of the underlying data. More plainly speaking, from a rational man's

standpoint, such things would bring about a paradoxical situation beyond the control of economic laws or business principles.

No comparison, in the true sense of the word, can be made between the present case and that of the railroad company; for here, we have a violation of a public law by fraud, on the part of the Southern Oregon Company, and its predecessors in interest.

Defendant, Southern Oregon Company, relies upon the Statute of Limitations, and the Doctrine of Laches, to protect it in its unlawful and fraudulent claims to the property involved in this suit, beside, no doubt, upon general principles of law, which might govern in some cases, but which have no application here, for we have to do with the *breach of a public law*, and a plain violation of its express proviso. The rule is familiar: that as between a trustee and *cestui que trust*, in the case of an express trust, the Statute of Limitations has no application, and no lapse of time constitutes a bar. The relation of privity between the parties is such that the position of one is the position of another and there can be no adverse claim of position during the continuance of the relation (*Lewis v. Hawkins*, 23 Wall. U. S. 119, 126; 23 L. Ed. 113), and see other cases cited in this brief upon this particular point.

Defendant's position cannot be upheld, for the law invoked by it does not apply. If it did it would simply mean the repeal of the Granting Act, a Federal Statute, by a private litigant. It is unnecessary to say that it requires an Act of Congress to amend or repeal the Granting Act in this case. Defendant's contentions are absurd.

The following excerpt from *Johnson v. Ballou* indicates defendant's mental aberration in relation to Laches and Limitations.

"No court is at liberty to subject these sovereign legislative grants, which more partake of the nature of treaty cessions by the Union to one of its members than of individual bargaining, to the definitions and refinements which rules of municipal law apply to the grants and conveyances from man to man. When the government conveys by Act of Congress, that which constitutes its deed at the same time constitutes the law which defines the right or estate, and stamps it with whatever character it possesses. And so long as the government is only dealing with its own, the right or estate granted, whether anomalous or unprecedented, or otherwise, will be entitled to recognition and effect for just what it appears and was intended to be.—*Ballou v. O'Brien*, 20 Mich. 304.

It is unnecessary that the grant should be capable of being brought within any of the definitions given to estates by the common law. The one here examined seems to have been intended as a present conditional bounty to the State to encourage the building of railroads, and to become absolute and to attach to specific lands when the terms of the donation should be complied with. To devote the lands to this specific purpose, and work a transfer of the title, no further conveyance by the federal government was contemplated; it is assumed that a transfer of title was absolutely involved in the act itself and what should be done under it.

The State, then, had the title, though of course it was a floating title, not attaching to any particular parcels until the proper action should be had under the congressional grant to entitle some in-

tended beneficiary to select and convey them.—
Rutherford v. Green's Heirs, 2 Wheaton 196.”

Johnson v. Ballou, 28 Mich. Rep. 384-5;

Ross v. Barland, 1 Pet. 656, 7 L. Ed. 302;

Paup. et al. v. Drew, 51 U. S. 217, 222 (10 How. 217).

This grant requires, at the present time, but one thing to be done, and that is: that the land be sold in one hundred and sixty acre tracts for \$2.50 per acre to qualified applicants. Other courts having enforced similar conditions, their opinions are entitled to respect. We here insert the following portion of a case, which we contend is analogous to the present case, in every sense of the word, and sincerely believe that the rule laid down in that case should govern and control in this, for it carries out the will of Congress and does not “read anything into, or read anything out” of the Granting Act, and besides, to borrow a phrase, it is the “rule of reason”. The excerpt follows:

“But it is contended for the appellant that, as the grant by Congress was for the sole purpose of aiding in the construction of the Cairo and Fulton road and its branches, the General Assembly could not require the appellant to sell any part of its lands to particular persons and at a limited or fixed price. Had the grant by Congress been made to the companies to which the lands have been transferred, this objection would be pertinent and forcible; but as it was to the State, they necessarily became subject to the control and disposition of the Legislature, which, in the exercise of its discretion in the execution of the trust, could have created other companies and granted the lands to them, no obligation, certainly, was incurred by the State, in accepting the grant, to transfer them to the companies it did, nor, perhaps, to any other. The Legislature was

the sole judge of the measures appropriate or expedient to effect the end intended by the grant, and to enable the State to discharge the trust reposed in it by Congress.

The provision conferring on occupants the right to purchase one hundred and sixty acres, including their improvements, at two dollars and fifty cents per acre, was a just and reasonable one, the price so fixed being twice that at which the Government offered them previous to the grant to the State, and the appellant, accepting the grant upon the terms and conditions imposed, must be held to abide by and perform them." (The italics are ours.)

Little Rock and Fort Smith Railroad Co. v. Howell, 31 Ark. Rep. 119, 127.

Defendants contend that many plaintiffs have been improperly joined in this case, and that the complaint is vulnerable on that account. This contention might be correct in certain cases, but it is not in this, for the suit is brought to administer a trust, and the authorities cited under paragraph I of this brief sustain the right to bring this suit in this manner, beyond question, and further argument is unnecessary to show that this is all one transaction; that all are interested in the result to be obtained, and the proofs are the same throughout. Likewise, the objection to the joinder of defendants, Southern Oregon Company and the State of California is not well taken, for the Southern Oregon Company holds this property as trustee, *ex malificio*, and the State of Oregon is alleged to have an actual interest and estate in the property involved, and is a necessary party to this suit, and can be properly joined with defendant, Southern Oregon Company. The au-

thorities cited in the last part of paragraph I sustain this proposition and completely overthrow defendants' objection.

Again defendants claim that plaintiffs have no legal or equitable right to enforce the condition of any trust, in this suit, or any other kind of a suit, I assume. This would be true if this nation was Mexico and the parties plaintiff were *peons*. Congress granted these lands to the State of Oregon to be distributed to settlers who would improve them and build up the community wherein they were situated. No sane man will deny this statement. To hold otherwise the court must say that Congress granted these lands to the State of Oregon for the purpose of having them transferred to timber speculators and "malefactors of great wealth". Such a construction of this Granting Act would be ridiculous, and could not be sustained. (See authorities cited in paragraph II of this brief.) Congress acted honestly, and in good faith, when they granted these lands, and really intended that the Act of Congress should be carried out in the letter and in the spirit, as it was in the matter of the "Wheeler Deed" and many other transfers. To hold otherwise, it would be necessary to say that Congress was composed of crooks and that the land was granted to Oregon for the express purpose of retarding its development and enriching a few unprincipled manipulators of title.

Coming to one of the main questions in the case, we claim that the grant was a trust; that the State of Oregon was a trustee, and, by virtue of the many transactions alleged in the complaint if plaintiffs, it still

continues to have an interest or estate in the grant. The authorities cited in paragraph III of this brief sustain this proposition beyond any question, and the grant from Congress to the State of Oregon speaks for itself.

Closely coupled to this is the Federal question raised by the complaint. We are seeking a construction and an interpretation of the Granting Act, for the purpose of obtaining a ruling as to whether or not said Act made the State of Oregon a trustee with the power of selling all these lands, and this question must be decided by this court, under the terms of said Act, either one way or the other. The complaint therefore raises a Federal question, for the construction of this Act is directly involved. See paragraph IV of this brief and cases cited.

Paragraph V of this brief and the authorities cited shows, under the allegations of the complaint, that defendant, Southern Oregon Company holds this land as trustee, *ex malificio* and in contravention to a statute, to wit: The Granting Act. To deny this would be to contend that this corporation was above the law. This is not true; it may be "*without the law*", and no doubt it is, but it has no power to set aside a Federal Statute.

Plainly speaking, if this corporation may go unwhipped of justice, no man need respect any law, or acknowledge his obedience to it, be it against treason, murder, *or any other public crime*.

It is elementary that a sale of lands in larger quantities than provided for in the public grant is void, and no title passes, and where a trust is expressly

created every sale, or breach, or contravention of the trust is absolutely void. See paragraph VI of Points and Authorities in this brief.

This is our contention: that the Coos Bay Wagon Road Company, could convey no title to these lands, to any party, unless they were sold according to the terms of the Granting Act; therefore, when the Wagon Road Company made the transfer of certain lands to Miller, such transfer was utterly void; likewise, when the transfer was made to Besse, that transfer was void; it could not convey a title in this manner, *for it was done in defiance to the law.* In fact throughout the whole brief and the history of this case, that is the center around which everything swings.

Not content with selling the land the Wagon Road Company had the unspeakable effrontery to sell the wagon road bed itself. Comment upon this particular transaction is unnecessary, but it is pointed out to the court just the same, and in the most emphatic manner possible.

If this, or any other court, will not enforce the conditions of this grant, then, there is abundant reason to believe in Roosevelt's recall of decisions. The law is so plain that it cannot be denied, or overcome, in any satisfactory manner. Congress meant but one thing and that was: that the land should be sold in the manner specified in the Granting Act.

One simple question put to this court will settle the whole controversy: Did Congress intend that the Southern Oregon Company, or any other individual, corporation, or association should be the beneficiary of this

grant as a whole? If this court can say that Congress did intend such a thing to transpire then the law is a "dead letter". Mr. Justice Swayne in *Seymour v. Freer*, 75 U. S. (8 Wall.) 202, whose opinion must be respected, and followed, did not understand a trust in this way. He defined a trust as

"where there are rights, titles, and interests in property, distinct from the legal ownership. In such cases the legal title, in the eye of the law, carries with it to the holder, absolute dominion, but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a Court of Equity will protect and enforce, whenever its aid for that purpose is invoked".

Crosby v. Cotton, 24 S. W. 343, 347; 5 Tex. Civ. App. 583.

Paragraph VIII of this brief and the authorities cited sustain the position of Mr. Justice Swayne.

Following, in natural sequence, this statement of the rule, we refer the court to paragraph IX of this brief, and contend that a court of equity has absolute jurisdiction over a case of this kind.

The attention of the court is again called to the proviso in the Granting Act, which is *imperative*, and the word "shall" is used therein in its most exact sense and cannot be misconstrued under the authorities cited in paragraph X of this brief. In *Law Guarantee and Trust Co. v. Jones*, 58 S. W. 219, 220; 103 Tenn. 245 (quoting Sugd. Powers). This principle is plainly stated as follows:

"The distinction between a power and a trust has been clearly defined by the courts. A mere

power is not *imperative*, but leaves the action of the party receiving it, to be exercised at his discretion; that is, the donor or grantor, having full confidence in the judgment, disposition, and integrity of the party, empowered, may act according to the dictates of that judgment and the promptings of his own heart. A trust is *imperative*, and is made with strict reference to its faithful execution. The trustee is not empowered, but is required, to act in accordance with the will of the one creating the trust."

That is what the word "shall" means in this Granting Act. It is not a "naked power". The clause in the Act imperatively says that the lands "shall" be sold to any one person, only in quantities not greater than one-quarter section, and for a price not exceeding two and 50/100 dollars per acre.

Taylor v. Benham, 46 U. S. (5 How.) 233, 269;

12 L. Ed. 130;

Story, Eq. Jur., Sec. 1070;

Chew v. Hyman, 7 Fed. 7, 15.

Passing to paragraph XI of this brief, and reiterating and referring to the "Miller", "Wheeler" and "Besse" deeds, hereinbefore set forth, it is plain to be seen that the Southern Oregon Company, and its predecessors in interest, were not bona fide purchasers, in any sense of the word. The face of the "title papers" indicate the source and nature of the title, and these parties, in attempting to unlawfully acquire this land, had actual, as well as constructive notice of the trust and knew that they were taking the land on a gamble in violation of the *imperative* terms of the trust.

Having "gambled" on this title *and accepted it*, with full knowledge, the Southern Oregon Company are es-

topped from denying the effects of the deeds, and the different Acts from which the title flowed. Paragraph XII and the authorities there cited absolutely hold the Southern Oregon Company to their own actions, and it is well said in *Maynard v. Maynard*, 4 Ed. Ch. 711, that:

“There is, likewise, another principle which Courts of Justice cannot fail to recognize, and which precludes the grantee in such a case as the present, and those claiming under him, from taking an objection to any part of the deed, as being inoperative and void. The principle is this: That no man can claim under a deed or will without confirming the instrument under which he claims; for, when he claims under a deed, he must claim under the whole deed altogether; he cannot take one clause and ask the court to shut its eyes against the rest.”

Defendants meet an insurmountable barrier in the case of *Foxcroft v. Mallett*, 45 U. S. 353; 4 How. 353, 367; 11 L. Ed. 1008, wherein it is held that this is a “clinging condition” to the estate, no matter in whom the title is found, and even in remote alienees, it is a condition running with the land (citing authorities in paragraph XIII of this brief). It is safe to say that defendants cannot shake the power of *Foxcroft v. Mallett*. It is law and has an unbreakable grip upon these lands. If this statement is not true then there is no such thing as law.

Patents were issued to the Wagon Road Company by the government, and a confusion of ideas sometimes occurs from the use of the word “patent”. Lands granted, as they were in this case, are not conveyed by the patent. The title pre-

cedes the patent and the patent merely designates or describes the lands granted. The Supreme Court of the United States has passed upon this question so many times, that no argument is necessary to show that *restricted patents*, issued in this manner, are not to be considered. The court must direct its attention to the Granting Act, and nothing else, to interpret it, thereby raising a Federal question, as hereinbefore stated, in support of which we refer the court to paragraph XIV of this brief.

As between the trustee and the *cestui que trust*, in a trust created by a public Act of Congress, the Statute of Limitations has no application. Such trusts are not reached or affected by limitations or laches (*Gutch v. Fosdick*), 48 N. J. Eq. (3 Dick.) 353, 355; 22 Atl. 590; 27 Am. St. Rep. 473. *This statute granting these lands is a public act, and stands in full force and effect today, consequently the statute has not commenced to run; neither can it. Foxcroft v. Mallett, supra.* The court is referred to paragraph XV and cases cited.

Adverse possession, and color of title, cannot be claimed by defendants in this case, for all deeds upon which defendant, Southern Oregon Company bases its title were executed in violation of a public law (paragraph XVI of this brief).

The joint resolution of Congress approved April 30, 1908 (35 Stat., part I, 571), did not, in any way, impinge upon the estate of the State of Oregon, in these lands; it merely authorized the Attorney General of the United States to bring suit against the Southern Oregon Company. The State of Oregon was not present, nor

involved, in any way, upon the passage of said resolution. Before the government can interfere with the title of the State of Oregon, as trustee, to these lands, some Act of Congress must be passed involving the State of Oregon; for instance, to repeal the Granting Act, revoke the trust, or implicate the State in some manner in which it may be heard and represented by its Senators and Representatives in Congress.

Congress has not done this, and it is respectfully submitted, for the purpose of this suit, that the State of Oregon has an interest in these lands and the proceeds thereof, for school purposes, or the construction of roads, or such other matters and things as its legislature may determine. No power exists in the government, at the present time, to wrench these lands from the State of Oregon (*U. S. v. Southern Oregon Company*, 196 Fed. 423, 426).

A grant by the United States to a State upon conditions, and the acceptance of the grant by the State, constitutes a contract executed.

McGee v. Mathis, 4 Wall. 143, 155; 18 L. Ed. 314;
Fletcher v. Peck, 6 Cranch. 87, 135; 3 L. Ed. 162;
Dartmouth College v. Woodward, 4 Wheat. 518,
 657; 4 L. Ed. 629;
Prov. Bank v. Billings, 4 Pet. 514, 562; 7 L. Ed.
 939.

There is no reason why the State of Oregon should avoid the issue in this case and it could not, for it would jeopardize its inchoate rights in these lands.

The State of Oregon and the Southern Oregon Company are co-trustees of these lands and are properly joined as defendants: former Chief Justice John Marshall of the United States Supreme Court says:

“It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.”

Bank of U. S. v. Planters Bank of Georgia, 22 U. S. 904, (9 Wheat. 904) opinion by Ch. J. John Marshall.

Salem Mills Co. v. Lord, 42 Or. 82; 69 Pac. 1033; 70 Pac. 832, holds, as a general rule, that the State may refuse to submit to the jurisdiction of the court, or it may submit and enter into the controversy. The situation in the present case is within the principle laid down in *Bank of U. S. v. Planters Bank of Georgia*, *supra*, for the State of Oregon *has appeared* in this case. If it refused to submit to the jurisdiction of this court the lands involved would, unquestionably, be forfeited to the United States, for such breach of trust, and open defiance of the Federal Granting Act.

The State of Oregon has appeared in this case, and submitted to the jurisdiction of this court, and there is no reason why the trust should not be administered,

the law complied with, and the people of the State of Oregon relieved from this fraudulent incubus. The parties are all before the court, and we insist that the court proceed to mete out justice by virtue of its power and authority in the premises.

Respectfully submitted,

T. S. MINOT,

Attorney for Appellants.

E. L. C. FARRIN,

Of Counsel.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

D. T. BATEMAN, *et al.*, Appellants,

versus

SOUTHERN OREGON COMPANY, a
Corporation, *et al.*, Appellees.

Appeal from the District Court of the United States
for the District of Oregon.

Brief for Respondent Southern Oregon Company.

STATEMENT OF THE CASE.

Before discussing the merits of the case, we desire to call the attention of the Court to the fact that this suit involves 113 separate and individual claims to real property made by an equal number of plaintiffs who have commenced suit for the purpose of compelling conveyances to be made to them by the defendant Southern Oregon Company for the specific tracts of land claimed by them respectively, in which separate tracts of land, however, the other

plaintiffs have no interest. The value of each tract of land, and therefore the amount in controversy is in the complaint alleged to be \$2000.00, and therefore is not within the jurisdiction of the Federal Court (p. 43, Record). Diverse citizenship is neither alleged nor claimed. There is a general allegation to the effect that a Federal question is raised by the Bill, requiring a construction and an interpretation of Federal statutes, (p. 43), but we fail to find any provision of the Judiciary Act that plaintiffs can avail themselves of.

There is nothing in the Act of Congress of March 3, 1869, (The Wagon Road Grant) conferring upon the plaintiffs any right to acquire any of the lands granted by Congress to the State of Oregon, nor are they specifically, or otherwise, designated in said Act, or referred to in any manner. Therefore, even though the jurisdictional amount involved was sufficient, there is no Federal question involved in the suit. The act of Congress might in a proper case require judicial construction, and thus confer jurisdiction upon the District Court, but as to these plaintiffs, there is no real substantial dispute or controversy within the meaning of the Judiciary Act.

However, the fact that the amount in controversy is below the \$3000 minimum limitation excludes the jurisdiction of the Federal Court in any aspect of the case.

Leaving this point, which we think will be decisive of the case, we will now consider the case as made by the bill.

The plaintiffs, 113 in number, designate themselves as "claimants" and allege themselves to be "a voluntary unincorporated association," but the character or purpose of such association is not disclosed by the Bill of Complaint, nor does it appear what is claimed from such association. The Southern Oregon Company, owning or claiming to own what is known as the Coos Bay Wagon Road grant of lands in Coos and Douglas Counties, Oregon, is the principal defendant and the real party in interest in this controversy. The State of Oregon, Oswald West, Governor, and A. M. Crawford, Attorney General, are the other defendants to the suit.

It appears from the Bill of Complaint that for the purpose of constructing and maintaining a military wagon road between Coos Bay and Roseburg, Oregon, the Congress of the United States on March 3, 1869, passed an act granting to the State of Oregon alternate sections of public lands designated by odd numbers, to the extent of three sections in width on each side of said road, to be disposed of by the Legislature of the State of Oregon for such purpose, such road to remain a public highway for the use of the Government of the United States free from tolls or other charges, and to be so constructed as to permit of its regular use as a wagon road.

Said Act of Congress contained the following proviso: "Provided further that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a

price not exceeding Two Dollars and Fifty Cents per acre."

On October 22, 1870, the Legislature of the State of Oregon, pursuant to said original granting act and in acceptance of the subject matter thereof and for the purpose of providing for the construction and maintenance of such wagon road, duly granted, assigned and transferred said wagon road grant and lands to the Coos Bay Wagon Road Company, and the defendant Southern Oregon Company is the successor in interest and by a regular chain of mesne conveyances for a full and adequate consideration has acquired all the estate and title of said Coos Bay Wagon Road Company in said wagon road grant and lands.

The Coos Bay Wagon Road Company fully complied with all the conditions and requirements of the aforesaid Act of Congress and the Act of the Legislature of Oregon referred to, and duly constructed said wagon road and became entitled to and duly acquired the title to the lands embraced in said grant, and thereafter in due course patents from the Government of the United States were duly issued for said lands. These patents conveyed the lands unqualifiedly and contained no restriction as to quantity of land to be sold one person, or price to be charged therefor.

The Bill recites at some length the various transfers, voluntary and involuntary, made of said lands, and the proceedings by which title was finally vested in the defendant Southern Oregon Company, which

transfers of interest are alleged by plaintiffs to have been wrongful and invalid because, as alleged, in violation of the proviso above quoted.

In our view of this case it is scarcely necessary to discuss this feature of the Bill, because as we shall show the plaintiffs have no interest in or right or valid claim to the lands to which they seek to acquire title, and therefore are in no position to impugn the title of the Southern Oregon Company to the lands in question.

In brief, the real controversy is this: The plaintiffs contend that because of the proviso contained in the Act of Congress of March 3, 1869, above quoted, they have the right to demand a sale and conveyance to them of 160 acre portions of said land for the sum of \$2.50 per acre, and they allege that they have severally selected lands in quantities of 160 acres and have tendered the defendant Southern Oregon Company \$2.50 per acre for said lands so selected, and that said defendant the Southern Oregon Company declines to recognize such selections or accept the tenders made, and refuses to convey to plaintiffs the lands selected by them respectively.

The Bill further charges that by virtue of the matters alleged the defendant Southern Oregon Company is an involuntary trustee of all the lands involved in this suit, and said lands are held as a constructive trust by said defendant with no title or interest in or to the same, and that "the true title to all said lands is in the State of Oregon, except such fraudulent and pretentious right as the defend-

ant Southern Oregon Company at this time wrongfully, unlawfully and fraudulently holds as an involuntary trustee of a constructive trust"; that the State of Oregon has permitted the Southern Oregon Company and its predecessors to hold and possess these lands and refused to wrest them from said defendant, and for that reason the State is made a party defendant, not in its sovereign capacity but as a co-trustee with the Southern Oregon Company.

The Bill further shows that pursuant to a joint resolution passed by the Congress of the United States, approved April 30, 1908, the United States commenced suit against the Southern Oregon Company in the then Circuit Court of the United States for the District of Oregon to forfeit to the Government of the United States all the lands held by it derived through mesne conveyance from the Coos Bay Wagon Road Company, including the lands involved in this suit, and that such suit is still pending and undetermined.

It is further alleged that the value of each individual claim of 160 acres of land involved in this suit is over the sum of \$2000.

The defendant Southern Oregon Company moved to dismiss the Bill on the ground that there was a misjoinder of parties both plaintiff and defendant; that the suit was barred by the Statute of Limitations and by laches, and that the Bill did not state facts sufficient to constitute a valid cause of action in equity.

Upon due consideration the motion was sustained by the District Court and the suit dismissed.

POINTS AND AUTHORITIES.

The Bill of Complaint alleges the value of each individual claim involved in the suit to be over *Two Thousand Dollars*, exclusive of interest and costs. This is not sufficient value to confer jurisdiction upon the Court.

The original jurisdiction conferred upon the district courts embrace "all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds exclusive of interest and costs the sum or value of *three thousand dollars*, and (a) arises under the Constitution or laws of the United States * * * or (b) is between citizens of different states."

36 St. at L. 1087.

In cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless if there are several and separate interests in that sum belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court can not be maintained where such separate interests are below the jurisdictional amount.

Putney v. Whitmire, 66 Fed. 385.

Wheless v. City of St. Louis, 96 Fed. 865.

Walter v. Railroad, 147 U. S. 373.

Clay v. Fields, 138 U. S. 464.

King v. Wilson, 1 Dill. 555, 568.

4 Fed. Stat. Ann. p. 267-7.

Fosters Fed. Pr. (5th ed.) 45.

The plaintiffs by their claim of right to compel a sale to them of portions of the wagon road grant have not presented a Federal question on which the District Court could base jurisdiction. It has even been held that the mere assertion of a title to land derived to the plaintiffs under and by virtue of a patent granted by the United States, presents no question which of itself confers jurisdiction on a Federal Court.

Blackburn v. Portland, 175 U. S. 571.

Florida v. Bell, 176 U. S. 321.

Devine v. Los Angeles, 202 U. S. 132.

The Federal question in the case must be substantial and not merely colorable.

1 Fosters Fed. Pr. (5th ed.) p. 59.

St. Joseph, etc. v. Steel, 167 U. S. 662.

The Circuit Court of Appeals of its own motion will inquire whether the trial court had jurisdiction of the controversy, and will not determine the appeal if Federal jurisdiction is not shown.

Hare v. Birkenfield, 181 Fed. 825.

If there be a single postulate of the common law, established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void, whether good or bad, wise or unwise.

Levy v. Levy, 33 N. Y. 97, 107.

Stonestreet v. Doyle, 75 Va. 356.

Weaver v. Spurr, 56 W. Va. 95, 105.

Brown v. Caldwell, 23 W. Va. 193.

Pomeroy's Eq. Jur. (3d ed.) Sec. 1009.

Beach on Trusts & Trustees, Sec. 322.

Perry on Trusts, Secs. 66, 95.

U. S. v. O. & C. R. Co., 186 Fed. 861, 904.

The declaration of the law is that the grantee shall sell in quantities not greater than one-quarter section to one person. If this be a maximum limitation it is surely not a minimum limitation, and the grantee might sell to one purchaser less than one-quarter section and be within the law, and so there is palpable uncertainty as to the amount of land each claimant is entitled to demand under the supposed trust, he being the *cestui que* trust.

It is clear the theory of a trust must fail because of uncertainty in these particulars, namely, as to the *cestui que* trust and as to the quantity of interest he is entitled to receive.

U. S. v. O. & C. R. Co., 186 Fed. 910.

In a case similar to the one at bar, prosecuted against the same defendant and involving the same land grant, and where the same relief was sought, it was held that complainant, having permitted a long period of time to elapse, was barred by laches from maintaining a bill to compel defendant to convey a portion of the land to him on payment of the price specified in the grant.

Nichols v. Southern Oregon Co., 135 Fed. 232.

A court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights or where long acquiescence in the assertion of adverse rights has occurred; and in these respects each case must be governed by its own circumstances.

Hammond v. Hopkins, 143 U. S. 224.

Mackall v. Casilear, 137 U. S. 566.

Norris v. Haggin, 136 U. S. 386.

Abraham v. Ordway, 158 U. S. 416.

Lansdale v. Smith, 106 U. S. 391.

Jackson v. Jackson, 175 Fed. 710.

Felix v. Patrick, 145 U. S. 317.

Hanner v. Moulton, 138 U. S. 486.

Foster v. Mansfield, 146 U. S. 88.

Although it is true that when the relation of trustee and *cestui que* trust exists and is admitted by the trustees, lapse of time is no bar to relief in equity against the trustee in favor of the *cestui que* trust, yet when the trustee repudiates the trust in unequivocal words and claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the statute of limitations begins to run from the time when they thus came to his knowledge.

Philippi v. Philippe, 115 U. S. 151.

Speidel v. Henrici, 120 U. S. 377.

The transfer by the State and the several subsequent transfers were open disavowals of the trust relied upon, if it can be made out that there was such a trust.

Nichols v. Southern Oregon Co., 135 Fed. 232-4.

ARGUMENT.

The purpose of this suit is to have the Act of Congress approved March 3, 1869 (the Coos Bay Wagon Road grant) so construed as to convey title to the lands thereby granted in trust *only*, to sell the same at a price not exceeding \$2.50 per acre to any person who might apply therefor, in quantities not exceeding one hundred and sixty acres, and to ob-

tain a decree requiring the Southern Oregon Company to respect the applications made by the "claimants" so styled for the purchase of one hundred and thirteen quarter sections of the land, to accept the tenders made on the basis of \$2.50 per acre, and to make conveyances to the "claimants" accordingly.

The history of the grant, the construction of the road and the disposition of the granted lands prior to November, 1880, is instructively and tersely recited by Judge Deady in the case of *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawyer 574, to a perusal of which we respectfully invite the Court.

It appears from the Bill of Complaint that the "claimants" contend that they have a vested right estate and interest in the lands which they have severally applied to purchase from the Southern Oregon Company, but there is nothing in the Bill from which it can be inferred that the Southern Oregon Company or any of its predecessors in interest, from the State of Oregon down, during a period of more than forty years at any time or ever admitted or acknowledged any trust relations of any character or description with any person, nor does it appear that the "claimants" (appellants in this suit) or any other person during the forty years which have passed since the lands were earned by the timely completion of the military road, ever either claimed or intimated that any such trust relations existed prior to the applications of the "claimants" to acquire the title to the lands in question, which presumably were made just prior to the commencement of this suit.

The motion to dismiss the Bill, which was sustained by the District Court and from which an appeal was taken to this Court, calls for the judgment of the Court upon the following questions :

First: Does the provision of the act upon which appellants rely convert the otherwise absolute title to the lands granted into a trust estate, continuing down through successive owners to the defendant, the Southern Oregon Company, or

Is the provision to be regarded as a condition subsequent, for a breach of which the United States alone can enforce a forfeiture? And if so, had such condition not been waived and nullified by the issuance of patents conveying the lands unqualifiedly?

Second: If a trust estate was intended to be created were the "claimants" ever entitled to the benefits of a *cestui que trustent* thereunder?

Third: If the "claimants" were ever entitled to any benefit under said act, are they not now barred by their long delay in asserting whatever rights that may have accrued to them under the act?

The provision contained in the act upon which the "claimants" base their claim to the relief prayed for is as follows :

"Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only, in quantities not greater than one-quarter section and at a price not exceeding \$2.50 per acre."

It will be noted that this provision does not require the lands to be sold to one person or to a class

of persons, or at all. It is negative in its character and, like the other provisions, is made solely for the purpose of avoiding a possibility of the title to the lands passing from the State absolutely before the full completion of the road in aid of which the grant was made.

It is plain also that this section must be read in connection with Section 5, providing how the lands are to be disposed of, which further provides that "lands hereby granted to said state shall be disposed of only in the following manner, that is to say, when the Governor of the State shall certify to the Secretary of the Interior that ten consecutive miles of said road are completed then a quantity of the land granted, not exceeding thirty sections, may be sold, and so on from time to time until said road shall be completed, and if said road is not completed in five years no further sale shall be made and the lands remaining unsold shall revert to the United States."

There is nothing in these provisions, nor in any of the provisions of the act, creating a trust, or indicating an intention on the part of Congress to create a trust. The timely completion of the road was the primary object of the grant. It is provided that in case the road should not be completed in five years no further sales should be made.

The road being seasonably constructed, it was not the intention of Congress to place limitations upon either the lands already sold, or the unsold portions of the lands thereby earned.

The Act of Congress granting the land to the

State not only provided that it should be applied to the construction of the road, but forbade its use for any other purpose. It also provided that the Legislature shall dispose of the land solely for that purpose. This was done. The land was disposed of by the Legislature, was applied as directed by the Act and the road was completed, and when the road was completed Congress had thereby accomplished all that was intended by its grant and the general Government had no further interest in the lands granted and whatever conditions, limitations or reservations the grant contained, if any, became nugatory and ineffective.

A trust will be enforced only on adequate evidence of a sufficient declaration. Such evidence is unequivocal proof that a trust has been created. It must be plain that the act which constituted the creation of the trust was completed—that it did not end in a mere intention. This is necessary, whatever may be the nature of the trust. There must be evidence of a declaration of trust in terms, or of words or acts which either create a trust *de facto*, or indicate beyond a reasonable doubt the purpose to create a trust. This evidence must be furnished by the settler or by the trustee, and it may be given in terms, or it may be involved in other acts relating to it.

Beach on Trusts and Trustees, Sec. 41.

Beaver v. Beaver, 117 N. Y. 428.

U. S. v. U. P. Ry., 11 Blatchford 400.

McDonald v. U. P. Ry., 97 N. W. 440 (70 Neb. 346).

United States v. Oregon, 186 Fed. 861.

Again, in the creation of a valid trust, there must be a certain, determinate beneficiary. In this case there is no person, nor class of persons, designated as the *cestui que* trust. The grant was not to the "claimants" nor for their benefit. Neither they nor their ancestors took any right, title or interest in the lands granted for the purpose of constructing the road. Neither were they under obligations to complete the road.

It is the rule that the beneficiary must be plainly designated in order to create a valid trust. A trust without a beneficiary that is in condition to demand its enforcement is void. The *cestui que* trust need not be designated by name, but the designation must be definite and certain. In short, there cannot be a trust without a *cestui que* trust, and if it cannot be ascertained who the *cestui que* trust is, it is the same thing as if there were none.

Pomeroy's Eq. Jur. (5 ed.) Sec. 1009.

Beach on Trusts and Trustees, Sec. 55.

United States v. Oregon, 186 Fed. 861.

It follows that if the act in question could be so construed as creating the State of Oregon a trustee of an express trust, the "claimants'" position would

not be improved, for if the trust has failed, either from the want of a determinate beneficiary in condition to demand its enforcement, or for any other cause, then, and in either case, a resulting trust arises in favor of the grantor.

Beach on Trusts and Trustees, Sec. 122.

Sims v. Sims, 94 Va. 580.

As before stated, there is nothing in the act that suggests a trust in favor of any prospective purchaser or speculator.

By the provisions upon which the "claimants" rely, there is no direction or requirement that any of the lands shall be sold at any time. The requirement is negative in character. The affirmative requirements are that the proceeds of the lands shall be exclusively applied to the construction of the road, and the intention is plain that the beneficiaries of the grant shall not dispose of the lands without constructing the road.

No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert this right to enforce a forfeiture on this ground, the title remains unimpaired in the grantee. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the

ground that the grantee has failed to perform the conditions annexed.

Denny v. Dodson, 32. Fed. 899.

Schulenberg v. Harriman, 21 Wall. 44.

Grinnell v. Railroad Company, 103 U. S. 739.

Van Wyck v. Knevals, 106 U. S. 360.

Railroad Co. v. McGee, 115 U. S. 663.

Bybee v. Railroad Co., 139 U. S. 663.

Railroad Co. v. Smith, 171 U. S. 260.

United States v. Loughrey, 172 U. S. 206.

The act of 1874, authorizing patent to issue, was a direct waiver of such conditions, or, what is equivalent, an acknowledgement of satisfactory performance. The patents issued or to be issued pursuant to that act, and which were in fact issued immediately thereafter, were in confirmation of and pursuant to the provisions of the act itself. Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, care, and disposition of the public lands. The responsibility, as well as the power, rests with the Secretary of the Interior, uncontrolled by the courts. (190 U. S. 324.)

It seems plain that the "claimants" cannot under any reasonable view of the act be considered

cestui que trustants of the granted lands. They are not now and never have been in privity either with the United States, or either of the successive holders of the title to the grant. They are strangers to the title, and have no vested interest in the lands they seek to recover. But were this otherwise, and assuming that the "claimants" were entitled to the relief sought, have they seasonably applied for it? Most emphatically, no.

The claim made or right asserted is stale and will not be enforced by a court of equity.

Upon this point the only question which can arise is as to the disaffirmance of the trust, if any existed. This is affirmatively shown by the bill.

The grant was made March 3, 1869. By its terms the road was of necessity completed on or prior to March 3, 1874.

The Bill further alleges, that thereafter and in June, 1874, Congress passed the act authorizing formal patents to issue, which were thereupon issued.

In the case of *Road Co. v. Crocker*, 6 Sawyer, 574, the U. S. Circuit Court for the District of Oregon determined that more than 35,000 acres of the grant were patented to the Road Company prior to May 31, 1875, and on that day all the lands so patented, except about 7000 acres theretofore sold to settlers thereon, were conveyed to John Miller, at the price of \$1 per acre, including the lands sought to be recovered in this suit.

This transfer and as well the mesne conveyances through which the Southern Oregon Company disraigns its title are set out in the Bill of Complaint. The contention of the "claimants" is that the provision of the act under consideration is a limitation upon the disposition of the granted lands as to quantity to each person, and that sales in excess of 160 acres to one person is a breach of the conditions of the grant.

The sale of the lands now sought to be recovered by the "claimants" was a disaffirmance of any trust for the "claimants'" benefit, if any ever existed. At the date of this transfer, or within a reasonable time thereafter, the "claimants" should have asserted their claim, if any they had. Indeed, the issuance of the patent to the road company without conditions was sufficient to put the "claimants" and all other persons upon notice, that the then owners were holding the granted lands by absolute right. Nearly forty years have elapsed since such sale, and yet it is not alleged that the owners of the lands ever acknowledged any trust relations existing between themselves and the "claimants," nor is it intimated that the "claimants" ever suspected or claimed such relation prior to the commencement of this suit.

In the meantime the lands, title to which the "claimants" now ask the court to decree to them, have, according to the allegations of the Bill very greatly advanced in value, and taxes have been paid on this land during forty years, aggregating many

times the \$2.50 per acre that the claimants offer to pay for the same.

No excuse is offered for this forty years' delay; and nothing appears in the Bill that would indicate that the "claimants" were not as well advised of their rights under the act forty years ago as they were when this suit was commenced.

The "claimants" allege that defendant denies and continues to deny the rights of plaintiffs under the act; but they do not aver, nor is it a fact, that either the defendant or any of its predecessors in interest ever admitted such right.

Should the court find it necessary to consider the question of the "claimants'" delay in applying to the court for the relief now demanded, we respectfully submit that by the transfer of the lands in gross and dealing with them as the absolute owners, the "claimants" were advised that any trust ever existing was disaffirmed by the holders of the legal title.

Under any view which may be taken, the "claimants" were at most unknown and unknowable, indefinite, and undeterminate beneficiaries. Neither the defendant, Southern Oregon Company, nor any of its numerous predecessors in interest, could know of their existence, if indeed they were in being at the time title was acquired. It was not the duty of the holders of the title to seek them out, but it was their duty, if they claimed any interest in these lands, to make seasonable application for an acknowledgement of such rights. The lands were sold

and resold; transferred by deed of the parties, and under the decrees of court, yet during all the time, and for nearly forty years they were regardless of any rights they may have had in the premises; and it is insisted that it is now too late for them to urge any such supposed rights.

In conclusion, we beg to call attention to the case of *Nichols v. S. O. Co.*, 135 Fed. 232, where a similar effort was made to impress a trust upon the lands of the Southern Oregon Company, and the identical questions involved in this case arose, and where the same contentions were made.

Bellinger, Judge, in the opinion rendered in that case, uses this language (page 234): "The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the state, subject to restrictions as to the price at which they should be sold and the quantity that should be sold to any one person. The restrictions were mere incidents of the grant, mere regulations that the state was required to observe in selling the granted lands, at such time after they were earned as the state should conclude to sell them. The object to be accomplished in no wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the state has violated its condition in the manner in which it has disposed of the granted lands. That is a matter that can

only be taken advantage of by the United States.”

The same decision upon identically the same character of grant with a similar provision respecting sales in quantities not exceeding 160 acres and for a sum not exceeding \$2.50 per acre was rendered by Wolverton, Judge, in the case of the *United States v. O. & C. R. R. et al.*, 186 Fed. 861.

For the reasons here suggested, the motion to dismiss the Bill of Complaint was properly sustained by the District Court, and we respectfully submit that the decree of the District Court should be affirmed.

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Defendant Southern Oregon Company.

